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No. 96-

In The Supreme Court of the United States

October Term, 1996

Harry S. Stonehill; Robert P. Brooks,
Petitioners,

v.

United States of America,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process Clause permit a Federal Court at the request of the Internal Revenue Service, to order dismissal of litigation filed in state court on behalf of the taxpayers' corporation and the taxpayers against a municipality for unlawful precondemnation of property owned by the taxpayers' corporation, and held in receivership, on the grounds that any value of the claim is speculative because of the lack of evidence of the municipality's improper intent, when the taxpayer has been denied an opportunity to proceed with discovery and where the IRS has allocated no value to the claims as a credit against the taxpayers' tax liability?

PARTIES TO THE PROCEEDINGS

Petitioners are Taxpayers Harry S. Stonehill and Robert P. Brooks. The Respondent is the United States of America Internal Revenue Service.

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PETITION FOR WRIT OF CERTIORARI

Harry S. Stonehill and Robert P. Brooks respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The May 20, 1996 opinion of the appeals panel of the United States Court of Appeals for the Ninth Circuit is reported at 83 F.3d 1156 (9th Cir. 1996), and is reproduced in the Appendix bound with this petition. (App. A at 1a).[1] The July 24, 1996 order of the appeals panel

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[1] Citations to the Appendix to the Petition for Certiorari, *infra*, will be designated as "App. —— at ——". Citations to the appendix submitted to the Ninth Circuit Court of Appeals will be designated as "A.Ex. Vol. ——, Tab —— at ——". Citations to mate-

of the United States Court of Appeals denying Petitioners' request for rehearing (App. E at 32a) is unreported. The Order of October 10, 1995, of the United States District Court for the Northern District of California under review (App. C at 23a) is unreported. The Opinion and Order of August 18, 1995, of the United States District Court for the Northern District of California accepting the sale transaction under review (App. B at 12a) is unreported. The Order of April 6, 1995, of the United States District Court for the Northern District of California expanding the scope of the receivership involved herein (App. D at 29a) is unreported.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit from which review is sought was entered on May 20, 1996. (App. A at 1a). That decision affirmed the October 10, 1995 Order of the United States District Court for the Northern District of California. (App. C at 23a). On July 24, 1996, the Ninth Circuit Court of Appeals denied a timely Petition for Rehearing. (App. E at 32a). This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the United States Constitution, Amendment V, provides in relevant part:

> . . . [n]or shall any person be . . . deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This petition arises out of a tax receivership ("Receivership") originally instituted on July 2, 1984, which recently

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rials contained in the clerk's record of the United States District Court for the Northern District of California will be designated as "CR. ——".

concluded with the confirmation of a sale transaction involving the last asset of the Receivership. The purchasers in this transaction are the Town of Tiburon, a California municipal corporation ("Tiburon" or "Town"), and the Marin County Open Space District, a California public agency ("OSD"). The sellers in the transaction are the Pine Street Management Corporation (doing business as the Harroman Company), through its Receiver and its sole shareholders, Petitioners Harry S. Stonehill and Robert P. Brooks, and the Petitioners' former wives, Lourdes B. Stonehill and Pacita Brooks. (CR. 1232, Ex. A).

The transaction involves the purchase of 101 acres of prime real estate, located in Tiburon, California ("Harroman Property"), and requires, as part of the sale, the dismissal of two lawsuits ("Tiburon Actions") filed by the sellers against Tiburon, for illegally down-zoning the Harroman Property. (*Id.*) The Harroman Property which is owned by one of the Petitioners' businesses, the Harroman Company (which is in turn owned by another entity belonging to the Petitioners—the Pine Street Management Corporation), is one of the largest undeveloped parcels of land in Tiburon. (CR. 1232, Ex. A).

On October 14, 1980, a judgment for tax deficiencies was entered against the Petitioners for the tax years 1958 through 1961. (CR. 732). The judgment set forth a principal amount of $4,926,925 owed by Harry S. Stonehill, with an additional amount of interest and penalties of approximately $4 million, bringing his total liability to $8,984,688.48. Robert P. Brooks was likewise found to owe a principal sum of $4,743,789, plus approximately $4 million in interest and penalties, bringing his total liability to $8,667,658.29. (*Id.*) Currently, the Petitioners' tax liabilities are comprised almost entirely of interest, the principal debts having been essentially extinguished by the application of proceeds from the sale of various assets owned by the Petitioners during the past eleven years.

On October 14, 1980, the District Court entered an order finding that the foregoing tax liabilities were secured by liens, which encumbered all of the Petitioners' interest in the following entities: The Harroman Company ("Harroman"); the Marinship Enterprises, Inc. ("Marinship"); and the real property owned by Harroman and Marinship located in Tiburon and Sausalito, California. (CR. 797). From 1984 to 1995, the Receiver disposed of various assets belonging to the Petitioners' and their businesses.[2] As of August 31, 1989, the sole remaining property subject to the tax lien is the Harroman Property.

On July 18, 1988, the Harroman Company submitted an application to the Town for approval of a master development plan for the Harroman Property (A. Ex. Vol. I, Tab 5 at 39), which consisted of 70 residential lots, which were to be clustered on one third of the property. The remaining 63 percent of the property was designated as open space. At that time, the 101 acre Harroman Property was zoned RPD-1 for residential use, with an allowable density of up to one dwelling unit per acre. (*Id.* at 40).

The Town responded to the application by forming a committee to acquire the property for open space. It also re-drafted its General Plan to identify the Harroman Property as "priority acquisition area" by using elements of its Draft General Plan to designate the property as desirable for acquisition through dedication, purchase, or "other means." It further amended its Draft General Plan so that the Harroman Property was designated as an

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[2] One of these properties, an apartment building, was appraised by the Receivership at $2.5 million, and sold in 1987 as a $3.94 million credit for an interest in one of the Petitioners' corporations; it was resold for $14.5 million in 1990. The Petitioners' request to review the receivership records pertaining to this sale transaction was denied by the District Court on December 2, 1994. (A.Ex. Vol. II, Tab 2 at 23)

"open space" buffer between adjacent properties. (A. Ex. Vol. I, Tab 5 at 59-60).

On April 26, 1989, the Town of Tiburon Planning Commission recommended approval of the General Plan containing a density of .4 units per acre, or 40 units maximum for development and on June 28, 1989, denied the application for development of 70 residential lots on the Harroman Property, on the basis that the proposed density was "inconsistent" with the maximum density stipulated in the Town's Draft General Plan. (A. Ex. Vol. I, Tab 6 at 64-66).

The Town's General Plan which was thereafter adopted on September 28, 1989, reduced the permitted residential density of the Harroman Property from 101 to only 30 residential lots (less than one residential unit per three acres). (*Id.*) The new General Plan also imposed upon the Property other significant and onerous development restrictions that had not been applied to other properties in Tiburon, and which reduced the allowable density on the Property by more than two-thirds from the density previously allowed under the earlier General Plan. (A. Ex. Vol. I, Tab 13 at 5-6).

On December 19, 1989, Petitioners filed a complaint for Writ of Mandate and Declaratory Relief and Damages (the "First Amended Petition") challenging the Town's denial of the 70-lot Master Plan application and the adoption and application to the Property of the new General Plan. (*Id.* at 6). Following a hearing on the Town's demurrer, the trial Court dismissed all causes of action finding that the takings claims were not "ripe" for judicial review, that there was insufficient evidence of unlawful "precondemnation zoning activity" and that plaintiffs had failed to prove their claim that the project was "spot zoned". (A. Ex. Vol. I, Tab 7 at 76). At the time of the trial court's decision, no discovery had been taken.

On appeal, the California Court of Appeal affirmed the trial court's decision in part, but reversed and remanded

the cause of action pertaining to the inverse condemnation claim to allow Petitioners to amend their allegations to allege a "ripe" takings claim pending a final decision by Tiburon. (*Id.* at 90). The California Appeal Court also reversed the trial court's dismissal of Petitioners' claim that Tiburon had engaged in a series of unlawful pre-condemnation down-zoning practices, intended to allow Tiburon to acquire the property for public use at a reduced cost. (*Id.* at 92). As grounds for reversal, the California Court of Appeal stated that "any finding of insufficient evidence of failure of proof could not be made at this stage of the proceedings" (*Id.* at 91), and that at that juncture of the case, the Court could not "speculate on the facts, if any, the plaintiffs will be able to produce to support the allegations in this cause of action." (*Id.* at 92). No discovery had been taken at the time of the California Appeal Court's decision.

Thereafter, Harroman submitted a new application seeking approval from the Town to develop the Property consistent with the new General Plan adopted in 1989. (A. Ex. Vol. I, Tab 13 at 7-8). Petitioners also proposed holding in abeyance their continuing claims against the Town arising from the adoption of the new General Plan until such time as a decision was made by Tiburon on the new application for approval. (*Id.* at 8). To that end, Petitioners and the Town, through their counsel, entered into a Stipulation providing an open extension of time for Petitioners to file a new or amended petition based on the decision of the California Court of Appeal. (*Id.*) The current Receiver, who at that time was counsel for Petitioners in the state Court litigation, advised the then acting Receiver that he "would recommend strongly against actively prosecuting this claim during the application review process" and that "actively prosecuting the litigation would jeopardize the spirit of cooperation that is an important element of our current track." As a result, no discovery was taken in connection with Petitioner's claims against Tiburon.

The Petitioners then applied to the Town in August of 1992 for a precise Development Plan approval to develop 30 residential lots on the Property, consistent with the new General Plan and the current zoning ordinance (the "30-Lot Precise Plan"). (A. Ex. Vol. I, Tab 13 at 8). The Town thereafter commenced to process the application, retaining an expert environmental consultant to prepare an Environmental Impact Report ("EIR") on the 30-Lot Precise Plan proposed for the Property pursuant to the California Environmental Quality Act (Public Resource Code § 21000, *et seq.*). (*Id.* at 8-9). That report determined that, with appropriate and feasible mitigation, the 30-Lot Precise Plan proposed in the Petitioners' application was consistent with the Town's General Plan, zoning ordinance and development standards, and would have no significant adverse impact on the environment. (*Id.* at 8).

In January of 1993, months after the Precise Development Plan application had been submitted by Petitioner Harroman and deemed complete, residents of Tiburon proposed an initiative bond measure for the purpose of raising funds to acquire the Property for public open space. (*Id.* at 13). The bond measure, designated Measure L, was adopted by the voters in June of 1993. (*Id.*) Pursuant to the bond measure, a Joint Powers Agency, consisting of the Town, the Town of Belvedere, and the Marin County Open Space District (collectively the "JPA"), was given authorization to acquire the Property. All members of the JPA possess the powers of eminent domain. (*Id.*)

Thereafter, following numerous public hearings held before the Tiburon Planning Commission and Town Council regarding both the project EIR and the application for Precise Plan approval, the Planning Commission in late January of 1994 recommended to the Town Council that Petitioners' application for approval be denied. (*Id.* at 1041). Following hearings on the 30-Lot Precise

Plan application before the Town Council in February 1994, the Town Council issued directions that the proposed project be substantially reduced in density and that a substantially larger portion of the property (well in excess of the 50% for open space set forth in the Town's current General Plan) remain completely vacant and undeveloped. (*Id.* at 11). During that period, the Town also enlisted the aid of a United States Senator in introducing a bill that required the IRS to "investigate" its role in developing the Harroman property. (A. Ex. Vol. I, Tab 8 at 95).

In response to the Town Council's direction, Petitioner Harroman submitted a revised project plan with a density of 21 residential lots, representing a reduction of 30% from the density permitted under the General Plan and zoning ordinance, and which avoided various features on the site consistent with the Council's orders. (A. Ex. Vol. I, Tab 13 at 11). During hearings held before the Planning Commission and Town Council on the revised project plan for 21 lots, the town ordered Harroman to remove two additional lots in the revised project plan, bringing the density down to 19 lots. (*Id.* at 12). Finally, on June 8, 1994, the Town Council adopted its Resolution No. 3027, approving a Precise Development Plan for the Property at a density of only 19 lots. (*Id.*) On June 15, 1994 the U.S. House of Represenatives voted to approve legislation which directed the IRS to investigate options other than developing the Harroman property, such as the alternatives to purchase previously proposed by the Tiburon Community. (A. Ex. Vol. I, Tab 8 at 95). On July 7, 1994, Petitioners filed a second complaint. (A. Ex. Vol. I, Tab 13 at 1).

The Town of Tiburon and the Marin County Open Space District ("OSD") eventually submitted a joint offer for $6.8 million to purchase the property and settle the lawsuits. The $6.8 million offered is the equivalent of the property's appraised value in its depressed state. (CR.

1243-48). As part of the proposed settlement, all individual plaintiffs would be required to execute dismissals with prejudice and tender releases of all claims. (CR. 1232, Ex. A, D).

In response to the Receivers' recommendation to accept this offer, the District Court requested that the Receiver obtain a written opinion from the trial counsel as to the viability of the litigation to assist the Court in reaching a decision as to the advisability of dismissng the lawsuit. (A. Ex. Vol. II, Tab 2 at 14). On December 16, 1994, trial counsel, Frederik A. Jacobsen, in a report to the District Court Judge, stated that he considered plaintiffs' precondemnation theory (*i.e.*, "that the town of Tiburon used its regulatory powers to aid public acquisition of the subject property at depressed price . . . .") to be "the most important liability theory" advanced in the Complaint. (App. G at 40a). With respect to that cause of action, Mr. Jacobsen concluded that the plaintiffs "have a viable precondemnation theory that could result in a 1989 date of value." (*Id.* at 45a).

Mr. Jacobsen further pointed out in his report to the District Court Judge, that in reversing the lower courts demurrer, the Court of Appeal had also recognized that the alleged improper precondemnation activity may have occurred in 1989 and it would thus, become a factual issue as to whether the plaintiffs could prove the Town of Tiburon's 1989 adoption of the General Plan was intended to improperly aid acquisition of the property. (*Id.* at 42a). Mr. Jacobsen advised the District Court that "the evidence of such an improper intent now known to us *without benefit of discovery* largely occurred in 1993 and 1994." (*Id.*) (Emphasis added). Mr. Jacobsen cautioned that *without discovery*, the trier of fact would have to draw an inference based upon circumstantial evidence that the Town's acquisitive intent existed in 1989, thus adding to the difficulty of the case. (*Id.*) According to Mr. Jacobsen:

> [o]ur more recent evidence appears to satisfy that standard if believed by the jury and if the jury infers that the Town's acquisitive intent existed in 1989. I am referring to evidence that the Town of Tiburon in 1993 entered into a joint powers agreement with other public agencies for the purpose of acquiring the subject property, a bond issue being passed in 1993 to acquire the property, and communications in 1994 from the public agencies (as opposed to the citizenry) to various federal officials urging those federal officials to interfere with the development plans for the property and force a sale of the property to the public agencies.

(*Id.* at 42a).

Mr. Jacobsen concluded that because of the inherently factual nature of this type of litigation, it was difficult to assess success in percentage terms and that it would be difficult to win on a theory that establishes liability and damages as of 1989, given the lack of any discovery.[3] (*Id.* at 45a). Notwithstanding this caveat, Mr. Jacobsen stated that "we have a viable precondemnation theory because there is legal precedent to support our theory" and the "evidence [known without the benefit of discovery] could support a jury verdict." (*Id.*)

Mr. Jacobsen estimated that the costs of trying the case to verdict, including discovery and expert costs would be $200,000 to $300,000. (*Id.* at 44a-45a). Both the IRS and the Receiver objected to this expenditure as unreasonable, despite the fact that from 1989, the Receivers' efforts to obtain the zoning approval of 19 lots from the original 101 lots allowed in 1988, and the costs associated with filing the first and second amended complaints had required expenditure of Receivership funds totalling approximately $2.5 million. (CR. 1000, Ex. B).

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[3] Indeed, Mr. Jacobsen did not expect that he would proceed to trial on a fact based precondemnation claim without conducting any discovery, and thus informed the District Court of this fact.

Following receipt of Mr. Jacobsen's opinion letter of December 16, 1994, the Court, in its December 19, 1994 Order, granted the Receiver's request to proceed with the transaction as outlined in Tiburon's offer. (CR. 1198). On January 3, 1995, the Petitioners filed a Motion for Reconsideration of the December 19, 1994 order and requested that prior to being required to dismiss the litigation, Petitioners should, at a minimum, be allowed to proceed with discovery to obtain evidence relating to Tiburon's intent regarding unlawful precondemnation activity. (App. F at 35a-36a). By order dated March 1, 1995, the Court denied the Petitioner's Motion for Reconsideration. (CR. 1211). On April 6, 1995, the Court also granted the government's Motion to Expand the Scope of the Receivership ("Motion to Expand Scope") to encompass Petitioner's personal claims against the Town. (App. D at 29a). In its order, the Court concluded that the offer with respect to the sale of the land and the settlement of the claims was "an undivided lump sum" and that the Court would "address the offer's adequacy in other proceedings." (*Id.* at 31a).

Because the purchase price, which was equivalent to the appraised value of the Harroman Property in its depressed state, did not ascribe any value to the Tiburon Actions (CR. 1240, 1241), Petitioners subsequently moved the Court for an order directing that the legal actions be appraised. (CR. 1240). The District Court denied the motion, concluding that based on the Court's evaluation, no separate appraisal was necessary. (App. B at 14a-15a). Petitioners then filed a Motion to Stay in the Marin County Superior Court, requesting that that Court not take any action to dismiss the state lawsuits pending resolution of the federal proceeding. (A. Ex. Vol. II, Tab 16 at 124). Before the Marin County Superior Court ruled on this motion, however, the District Court confirmed the sale of the property and ordered the Appellants to dismiss their personal claims. (A. Ex. Vol. II, Tab 17 at 33, 37). On October 10, 1995, the Dis-

trict Court issued its final order confirming the sale. (App. C at 23a). Appellants appealed this order to the United States Court of Appeals for the Ninth Circuit on October 17, 1995. (A. Ex. Vol. II, Tab 20 at 129). The Court of Appeals granted Petitioner's Motion for Emergency Stay on November 7, 1995. (A. Ex. Vol. II, Tab 23 at 147).

On May 20, 1996, the Ninth Circuit affirmed the District Court's order confirming the sale of the property and requiring Petitioners to dismiss the litigation against Tiburon. (App. A at 1a). To reach this result, the Appeals Court utilized a two-step approach. First, it found that the Petitioners' claims against Tiburon were meritless and had no intrinsic value because, as the sole shareholders in Pine Street Corporation, they could not bring a direct cause of action and that any claims by the Petitioners relating to the claim of consequential damages, which Petitioners had alleged were separate and distinct injuries, were merely incidental to the injury caused to the corporation by Tiburon. (*Id.* at 7a). Thus, the Appeals Court concluded that the District Court had not abused its discretion in foregoing appraisals of the Petitioners causes of action (normally required for personal property under 28 U.S.C. § 2001) or in ordering that Petitioners release and dismiss any claims they might have against Tiburon because those actions had no value. (*Id.* at 6a-7a).

Next, the Appeals Court concluded that although the Receivership, which controls the Petitioners' voting shares in Pine Street Corporation, *did* have valid claims against Tiburon, any value those claims might have was speculative at best, and that the District Court had considered the value of the lawsuits when it decided to approve the sale, based on the recommendations made by trial counsel regarding the viability of the lawsuits. (*Id.* at 9a-10a). On July 5, 1996, the Petitioners filed a Petition for Rehearing which was denied on July 24, 1996. (App. E at 32a). This petition followed.

REASONS FOR GRANTING THE PETITION

This case presents a question of substantial public importance concerning the rights of taxpayers to fundamental procedural safeguards which are required by due process before the government deprives a taxpayer of property. The Court of Appeals' decision gives full approval to the District Court's order of summary dismissal of causes of action filed on behalf of the Petitioners and Petitioners' corporation, without allowing any opportunity for discovery of facts or evidence to support clearly viable claims. This result is contrary to the decisions of this Court and squarely conflicts with the decisions of every federal circuit which has addressed this issue. The taxpayers have not disputed the right of the government to foreclose and sell assets of the taxpayer pursuant to federal tax liens. The issue, rather, is whether, as part of the sale of real property in which taxpayers have a beneficial interest, the taxpayers can be required prior to any discovery, to dismiss causes of action related to that property without the government crediting the taxpayers with any value, on the ground that those actions are "speculative".

DISMISSAL OF UNLAWFUL PRECONDEMNATION TAKINGS CLAIMS WITHOUT AN OPPORTUNITY FOR DISCOVERY VIOLATES DUE PROCESS

The Fifth Amendment commands the federal government: "no person shall . . . be deprived of life, liberty or property without due process of law . . . ." (U.S. Const., Amend. V). Due process guarantees that there is a fair decision making process before official action is taken which directly impairs a person's life, liberty or property. *Complaint of Bakers Trust Co. v. Bethlehem Steel Corp.*, 752 F.2d 874, 886 (3d Cir. 1984). One essential element of the adversary process which is required before the IRS can deprive a taxpayer of property, is the opportunity to present evidence and witnesses to the decision maker; a fundamental procedural safeguard neces-

sary to preserve that right is the right to pre-trial discovery of evidence.

Although Rule 56(c) of the Federal Rule of Civil Procedure provides courts with a useful method by which meritless cases may be discharged, the benefits of that rule are quickly undermined if it is employed in a manner that adversely affects concepts of fundamental fairness and seriously impedes an individual's right to a fair proceeding. *White's Landing Fisheries, Inc. v. Buchholzer,* 29 F.2d 229, 231 (6th Cir. 1994). In the instant case, the District Court's order of summary dismissal of the litigation filed in the state court, based on the Court's finding that the value of the claims was speculative, is a clear example of the misuse of the procedural rule, where the Petitioners' request for an opportunity for discovery prior to dismissal, is denied by the Court. (App. F at 33a).

In the state litigation, Petitioners most important liability theory against the Town of Tiburon, according to trial counsel retained by the Receiver, was the claim of Tiburon's unlawful precondemnation of the Harroman Property. In this cause of action, the Petitioners allege that Tiburon used its regulatory powers to aid in the public acquisition of the property at a depressed price. An essential element of this claim, however, requires evidence of Tiburon's improper intent, evidence most likely found within the possession of Tiburon.

In *Pollner v. Columbia Broadcasting System,* 368 U.S. 464, 473-474, 82 S.Ct. 486, 491 (1962), the Court observed that "summary procedures should be used *sparingly* in complex . . . litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." (*Id.*) (Emphasis added).

Following its decision in *Pollner,* this Court, in reversing the Fourth Circuit Court of Appeals decision to dismiss a lawsuit without allowing for discovery, held, that

"dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly, . . . where 'the proof is largely in the hands of the alleged conspirators . . . .'" *Hospital Building Co. v. Trustees of Rex Hospital,* 96 S.Ct. 1848, 1853 (1976), *citing Pollner,* 82 S.Ct. 486 (1962); *accord Gas-A-Car, Inc. v. American Petrofina, Inc.,* 484 F.2d 1102, 1105-1107 (10th Cir. 1973).

This Court has also been careful to state that the rules regarding the proper opposition to a summary judgment motion apply only after adequate time for discovery has been allowed. Thus, in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 2514 (1986), the Court stated that *Pollner* did not hold that a plaintiff could defeat a defendant's "properly supported" motion for summary judgment without offering concrete affirmative evidence, even where the evidence is likely to be within the possession of the defendant. (*Id.*) The Court emphasized, however, that this proposition was true only "as long as the plaintiff has had a full opportunity to conduct discovery." (*Id.*)

A similar interpretation of the rule regarding summary adjudication was adopted by this Court when it issued its opinion in *Celotex Corp. v. Catrett.,* 477 U.S. 317, 106 S.Ct. 2548 (1986). In *Celotex,* this Court, citing *Anderson,* held that Rule 56(c) mandated the entry of summary judgment "after adequate time for discovery" and upon motion, against a party who fails to make a showing efficient to establish an existence of an element essential to the parties case, which that party will bear the burden of proof at trial. The Court stated that because the parties had conducted discovery, there could be no serious claim that the respondent was in any sense "railroaded" by a premature motion for summary adjudication.

Although the Petitioners initial complaint was filed in 1989, no discovery was allowed pending a decision by the

trial court on the city's demurrer. After the trial court sustained Tiburon's demurrer and dismissed Petitioners' "taking" causes of action, no further litigation activity occurred until the issuance of the California Court of Appeal's decision on October 18, 1991. That decision, which reversed and remanded the Petitioners' causes of action for inverse condemnation and for unlawful precondemnation activity, held that any finding of insufficient evidence could not be made at that stage of the proceedings and that the Court would not speculate as to any facts that plaintiffs might be able to produce to support the allegations of the unlawful precondemnation claim. No discovery was taken, however, pursuant to the Receiver's recommendation that it would interfere with his ongoing negotiations with the city. Thus, by the time of the filing of Petitioners' second complaint in June of 1994, the Petitioners had still not been allowed to proceed with discovery. Although, the Petitioners subsequently requested that the Court allow discovery prior to dismissal of the lawsuits in order to obtain evidence of Tiburon's acquisition interest in 1989, Petitioners' motion was denied by the District Court in its March 1, 1995 decision. (CR. 1211).[4]

The only evidence in this case which the trial counsel concluded *did* show an improper intent on the part of Tiburon in 1993 and 1994, was obtained without the benefit of discovery during the several years Petitioners' claims have been pending. Unlike the Petitioners in *First National Bank of Arizona v. Cities Service Company,* 391 U.S. 253, 88 S.Ct. 1575 (1968) (where summary judgment was affirmed despite claim that "adequate" discovery had not been allowed), the Petitioners here have been denied

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[4] Petitioners' motion was comparable to a request under Rule 56(f) "which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the non-moving party has not had an opportunity to make full discovery". (*Celotex Corp. v. Catrett,* 477 U.S. at 325.)

not only adequate discovery but *any* discovery. As pointed out by Justice Black in his dissent:

> no Judge is granted power under Rule 56 *or any other rule* to completely deny a party all opportunity to take depositions or to get affidavits essentially needed to get a fair trial of his case . . . . Of course, a party who is suing a company and who is dependant for proof on company employees must have the force of the law behind him or he cannot get testimony from such employees against their company.

(*Id.* at 1601) (Emphasis added).

Similarly, any evidence of Tiburon's unlawful intent, which remains largely within the control of Tiburon employees and the Tiburon City Council, is unlikely to have been produced voluntarily following the filing of Petitioners' First Amended Complaint in 1989.[5] The District Court's evaluation that the claims have no merit was

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[5] The Court of Appeals for the Ninth Circuit has recently held that property owners alleging a violation of equal protection rights, arising from the use of a city's regulatory powers to deflate the value of the plaintiff's property which it wanted to acquire, was a fact question precluding summary judgment in a Section 1983 Civil Rights suit by property owners. *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). The Court, concluded that the defendant's conduct, if proved at trial, would constitute a violation of the plaintiffs' clearly established rights under the equal protection clause and that accordingly the defendants were not entitled to qualified immunity at the summary judgment stage against the plaintiffs' equal protection claim. In *Armendariz*, "the parties [had] conducted considerable discovery." (*Id.* at 1324 n.9). The *Armendariz* defendants had claimed that they were entitled to summary judgment because the plaintiff's had not created a genuine issue of material fact as to whether the defendants directed, organized or otherwise participated in the code enforcement sweeps. The Court concluded that if the facts alleged were proven at trial, the defendants were not entitled to qualified immunity against equal protection because the city cannot make land use decisions based simply on its own desire to acquire a private owners property for purposes unrelated to the city's action.

based on the Court's claim of extensive experience as a judge and a trial litigator (App. B at 14a-15a), and on the report submitted by trial counsel, prepared with the express *caveat* that it was being proffered without the benefit of discovery to support factually dependent claims. (App. G at 40a). That blind evaluation, which was the basis for summarily ordering that the Petitioners and the Receivership dismiss the litigation against Tiburon, deprived the Petitioners of a fundamental right of due process. Indeed, where there is *no* evidentiary footing to support summary adjudication by a Court as in the instant case, the party against whom summary action is taken not only suffers substantial prejudice, but is also deprived of the constitutional guarantee of due process of law. *See Thompson v. City of Louisville*, 362 U.S. 200, 203, 80 S.Ct. 624, 628 (1960) (record is entirely lacking in evidence to support Court action and thus such action is void as a denial of due process); *See also Garner v. State of Louisiana*, 368 U.S. 157, 171, 82 S.Ct. 248, 256 (1961).

In the case at bar, the summary dismissals of the state court claims clearly eviscerates Petitioners' right to due process of law because the only evidentiary record before the District Court contained evidence which supported Petitioners' unlawful precondemnation claims—even without discovery. Similarly, the only record before the Court of Appeals was likewise bereft of any evidence to support the District Court's drastic summary action. The Court of Appeals' affirmance of the summary dismissal of the lawsuits despite the dearth of an evidentiary record in support thereof, is in direct conflict with decisions of this Court. (*See id.*)

Discovery is one of the working tools of the legal profession which traces as far back to the equity bill of discovery in English Chancery practice. Recognizing that summary judgment is a "drastic device", Federal Circuit courts have unanimously held that it should not

be granted where the factual record is polarized, especially where no opportunity for discovery has been allowed. *Complaint of Bankers & Trust Co.*, 752 F.2d at 287; *see e.g., National Life Ins. Co. v. Solomon*, 529 F.2d 59, 61 (2d Cir. 1976); *White's Landing Fisheries*, 29 F.3d at 231; *Meyers v. Eugenio C*, 842 F.2d at 815, 817 (5th Cir. 1988) (a principal purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims after adequate opportunity for discovery, thereby enabling party opposing summary judgment to address some fact which could justify a judgment in his favor); *Backes v. Valspar Corp.*, 783 F.2d 77, 79 (7th Cir. 1986) (with discovery complete, summary judgment appropriate where non-movant has turned up no evidence to support essential elements of his case or defense) *citing Celotex, supra*; *Salahuddin v. Coughlin*, 993 F.2d 300, 308, 310 (2d Cir. 1993) (summary judgment allowed "*only* after adequate time for discovery . . . and thus District Court erred in granting summary judgment to defendants on the basis of [] an undeveloped record." (Emphasis added); *Ruder Intern. Corp. v. First American Nat. Bank*, 943 F.2d 1521, 1523 (11th Cir. 1991) (summary judgment should be granted when, *after* adequate time for discovery, non-movant fails to make a sufficient showing to establish evidence on which the party bears the burden of proof at trial); *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256, 1260 (4th Cir. 1993) (in order to permit Court to make adequate inquiry as to whether the evidence is so one-sided that one party must prevail as a matter of law, non-movant, after adequate time for discovery must make requisite showing of the existence of elements crucial to non-movant's case); *accord Schaeffer v. A.O. Smith Havestore Products, Inc.*, 74 F.3d 722, 727 (6th Cir. 1996); *Novola v. Texas Dept. of Human Resources*, 846 F.2d 1021, 1023 (5th Cir. 1988); *Barnhart v. Pickrel, Shaeffer & Ebeling Co.*, 12 F.2d 1382, 1389 (6th Cir. 1993). These decisions directly conflict with the decisions in this case which allow

summary dismissal of Petitioners' claims without any opportunity to develop evidence essential to support those claims.

CONCLUSION

This petition raises very serious questions regarding the fate of all complex litigation which the IRS purports to attach, ostensibly for the purpose of satisfying tax debts owed by a taxpayer. As discussed above, the lawsuits against Tiburon raise complex claims of unlawful precondemnation activity on the part of the Town, which require evidence of improper intent and which is likely found within the control and possession of Tiburon. In assessing the appropriateness of summary procedures in complex litigation, this Court has previously held that where motive and intent play leading roles, such procedures should be used sparingly, especially where proof is largely within the hands of the opposing party. *Pollner*, 82 S.Ct. at 491; *Hospital Building Co.*, 97 S.Ct. at 1853. Although this Court clearly stated that this was a "concededly rigid standard", the overriding concern was for fate of complex lawsuits such as those filed against Tiburon.

During the course of over seven years, the Internal Revenue Service has allowed the expenditure of over Two Million dollars of taxpayer funds, held in receivership, in pursuit of litigation to obtain the best sales price for the taxpayers' last asset. During this period, the value of that asset has declined from a potential property sale involving 101 developable lots in 1989 to 19 lots finally approved as a result of the Receiver's negotiations with the City of Tiburon. Without the benefit of any discovery to elicit facts as to the city's unlawful intent to reduce the value of the property, the Government and the Receiver now claim that any value to the taxpayers' litigation is purely speculative and that the claims must be dismissed to ensure the sale of the property to the very entity responsible for its depressed value.

To permit such extraordinary results without plenary review by this Court would be troublesome even if it could safely be predicated that what befell these Petitioners would not befall other taxpayers. But such predictions are notoriously unsafe and should not be made when the result is to deny the Petitioners the most fundamental element of due process which is required before the government deprives a taxpayer of property.

For these and all the foregoing reasons, Petitioners accordingly pray that a writ of certiorari issue so that such review may take place.

Respectfully submitted,

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Dated: August 19, 1996

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-17019
D.C. No. CV-95-43244-OMP

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HARRY S. STONEHILL; ROBERT P. BROOKS,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
Owen M. Panner, District Judge, Presiding

Argued and Submitted
February 15, 1996—San Francisco, California

Filed May 20, 1996

Before: Robert Boochever, Cynthia Holcomb Hall, and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Hall

OPINION

HALL, Circuit Judge:

Appellants Harry S. Stonehill and Robert P. Brooks seek to prevent the United States from selling real property in which they have an interest, pursuant to a federal tax lien. The property is held in a tax receivership, and the receiver entered into a contract to sell the property to the Town of Tiburon, California, for $6.8 million. The terms of the contract include a provision requiring dismissal of two state lawsuits filed against Tiburon by the receiver alleging that Tiburon depressed the value of the property through a series of illegal zoning procedures. The receiver agreed to dismiss the lawsuits on behalf of the receivership, but appellants refused to dismiss their personal claims. The district court ordered appellants to dismiss their claims, and they appealed this order. We now affirm.

I

This case began with a tax dispute filed against the appellants by the United States in 1965. Final judgment was entered against appellants in 1980, and the government subsequently secured liens on appellants' property. In 1984, at appellants' request, the court appointed a tax receiver to manage the foreclosure of the property. The real property at issue here is the last remaining property to be liquidated.

The property is owned by one of the appellants' businesses, Pine Street Corporation, and is a 101-acre tract in Tiburon, California, that is zoned for residential use. The value of this property derives mainly from the ability to construct residences thereon. From 1988 to 1994, Pine Street submitted several applications to Tiburon for approval of a development plan for the property. During the same period Tiburon substantially modified its General Development Plan. At one time the General Plan would have allowed Pine Street to develop one home site

per acre. In the end, however, Tiburon approved development of only 19 home sites on this property.

Throughout this process appellants contended that Tiburon engaged in illegal down-zoning in order to depress the value of the property so that the town could purchase the parcel for use as designated open space. The tax receiver filed two suits in California state court against Tiburon on behalf of Pine Street and the appellants, claiming inverse condemnation and other zoning improprieties.

After the second lawsuit was filed, the town of Tiburon and the Marin County Open Space Committee entered into negotiations to purchase the property for $6.8 million, with the condition that the receiver would dismiss the two lawsuits against the Town. The district court authorized the receiver to finalize the sale and instructed him to present the final offer to the court for approval. Appellants submitted a motion for reconsideration, asserting among other things that they objected to dismissal of their complaints against the Town. The district court denied the motion.

The United States then filed a motion to expand the receivership to encompass appellants' personal claims against the Town, contending that these claims were subject to the federal tax liens. The district court granted this motion on April 6, 1995. Appellants then filed a motion to stay in Marin County Superior Court, requesting that court not to take any action to settle or dismiss the state lawsuits pending resolution of the federal proceeding. Before the California Superior Court ruled on this motion, the district court confirmed the sale of the property, and ordered appellants to dismiss their personal claims. On October 10, 1995, the district court issued its final order confirming the sale. Appellants appealed this order on October 17, 1995, and we granted an emergency stay on November 7, 1995.

We review a district court's decision involving its supervision of an equitable receivership for abuse of discretion. *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986). Therefore, the district court's order expanding the receivership is reviewed under this standard.

II

The first on appeal concerns whether the government may attach and foreclose upon the appellants' personal lawsuits pursuant to the federal tax lien. We hold that the lawsuits, as choses in action,[1] are personal property subject to attachment and foreclosure by the government.

The Internal Revenue Code provides that: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all *property* and *rights to property*, whether real or personal, belonging to such person." 26 U.S.C. § 6321 (emphasis added). The Supreme Court has broadly construed this statutory language, noting that the statute "reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." *United States v. National Bank of Commerce*, 472 U.S. 713, 719-20 (1985). To determine whether the property is subject to the federal tax lien, the court conducts a two-part analysis. First, state law determines the nature of the legal interest the taxpayer has in the property. *Id.* at 722; *Little v. United States*, 704 F.2d 1100, 1105 (9th Cir. 1983). Once the court determines the state-law right possessed by the taxpayer, then the federal tax consequences are solely a matter of federal

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[1] Literally, a thing in action. "A personal right not reduced into possession, but recoverable by a suit at law. . . . A right to receive or recover a debt, demand, or damages on a cause of action ex contractu or for a tort or omission of a duty. . . . Personalty to which the owner has right of possession in future, or a right of immediate possession, wrongfully withheld." *Black's Law Dictionary* 241 (6th ed.1990).

law. *National Bank of Commerce,* 472 U.S. at 722; *Little,* 704 F.2d at 1105. Thus, federal law controls whether the state-law right constitutes property or rights to property attachable by a federal tax lien. *National Bank of Commerce,* 472 U.S. at 722; *Little,* 704 F.2d at 1105; *In re Kimura,* 969 F.2d 806, 810 (9th Cir. 1992).

Our first inquiry is whether California attaches any property rights to a chose in action, and we find that it does. California courts have consistently construed the Civil Code sections relating to property to include a chose in action, in contract or tort, as personal property. *See* Cal. Civil Code §§ 654 and 663; *Parker v. Walker,* 6 Cal. Rptr. 2d 908, 912 (Cal. App. 3 Dist. 1992) ("A cause of action to recover money in damages, as well as money recovered in damages, is a chose in action and therefore a form of personal property."); *Carver v. Ferguson,* 254 P.2d 44, 45 (Cal. App. 3 Dist. 1953) (holding that a cause of action in tort, being a thing in action, in personal property); *Besinger v. Davidson,* 147 F. Supp. 240, 245 (S.D. Cal. 1956) (holding that a chose in action for unjust enrichment is personal property under California law, which is subject to a federal tax lien).

The second question, then, is whether this interest consists of property or rights to property under 26 U.S.C. § 6321. We have held that if the state law interest is "an economic asset in the sense that it has pecuniary worth and is transferable," then it is subject to the federal tax lien. *Little,* 704 F.2d at 1105-06; *Kimura,* 969 F.2d at 811. We conclude that choses in action in California, such as the lawsuits at issue here, satisfy both of these requirements. First, it is obvious that a right to collect damages, albeit speculative, has pecuniary worth. Second, the Califonria Civil Code specifies that a chose in action, which is "a right to recover money or other personal property by a judicial proceeding," Cal. Civil Code § 953, may be transferred or assigned. Cal. Civil Code § 954. Therefore, appellants' causes of action against Tiburon

constitute property or rights to property to which federal tax lien consequences may attach. *Accord United States v. Comparato*, 22 F.3d 455, 457-58 (2nd Cir.) (holding that the taxpayers' vested interest in their deceased son's medical malpractice claims was subject to a federal tax lien), *cert. denied*, 115 S. Ct. 481 (1994).

Once a federal lien attaches to taxpayers' property, the government may then foreclose upon the property. *See* 28 U.S.C. § 2001. We conclude that the government may foreclose upon the taxpayers' causes of action just as it could any other real or personal property. A taxpayer's chose in action represents one of the taxpayer's assets, and the government has the right to pursue the action to judgment, even if the taxpayer may not have done so himself. The complement to the government's ability to pursue the lawsuit is the ability to settle or dismiss it. *Cf. National Bank of Commerce*, 472 U.S. at 725 ("In a levy proceeding, the IRS steps into the taxpayer's shoes . . . [and] acquires whatever rights the taxpayer himself possesses.") (internal quotations omitted). If the government was denied this avenue for resolving the suit, then the receivership may not be able to achieve the most advantageous outcome for all concerned.

The provisions of 28 U.S.C. § 2001 govern foreclosures of taxpayers' property. This section limits the government receiver's ability to sell foreclosed property at a private sale for an unfair price: "Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property . . . . No private sale shall be confirmed at a price less than two-thirds of the appraised value." By its terms, section 2001 applies only to real property. But section 2004 provides that sales of personal property must also be conducted "in accordance with section 2001 . . . , *unless the court orders otherwise*." 28 U.S.C. § 2004 (emphasis added). Therefore, it is at the district court's discretion whether to obtain appraisals before foreclosing upon personal property, such as appellants' causes of action.

The district court determined that the appellants' personal claims against Tiburon were meritless, and therefore, had no intrinsic value. Appellants do not own the property themselves. Instead, they are shareholders in Pine Street Corporation, which itself owns the property. They do not claim they are entitled to collect damages from Tiburon for the decrease in property value caused by the allegedly improper zoning. They concede that this claim belongs solely to the Pine Street Corporation, and is therefore controlled by the receiver. Instead, they claim that they are entitled to consequential damages measured by the increased tax liability they incurred due to interest penalties resulting from the delay in selling the property (from 1989 to now), allegedly caused by the improper zoning.

Well-established principles of corporate law prevent a shareholder from bringing an individual direct cause of action for an injury done to the corporation or its property by a third party. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949); *Sutter v. General Petroleum Corp.*, 28 Cal. 2d 525, 530 (1946); *Jones v. H. F. Ahmanson & Co.*, 81 Cal. Rptr. 592, 597-99 (Cal. 1969). Therefore, the causes of action against Tiburon belong solely to the Pine Street Corporation. Appellants' injuries are merely incidental to the injury caused to the corporation by Tiburon. *Cf. J&J Farms, Inc. v. Cargill, Inc.*, 693 F.2d 830, 836 (8th Cir. 1983) (holding that losses were not recoverable where they "were the projected result of a collateral or secondary enterprise and thus too remote and speculative"); *Northern Helex Corp. v. United States*, 524 F.2d 707, 720 (Ct. Cl. 1975) (noting that the lost profits from a corporation's collateral undertakings, which could not be carried out due to the defendant's breach, were too remote to be recoverable). The appellants have no valid personal claims against Tiburon, regardless of the fact that they are named in the complaints in their individual capacities. Thus, appellants' causes of action have no value. As a result, the district

court was within its discretion when it ordered appellants to release and dismiss any claims they may have against Tiburon in connection with this matter.

III

Even if the district court may properly dismiss their personal claims, appellants contend that the district court erred when it confirmed the sale. They assert three arguments as to why the sale is improper: (1) the statutory requirement of appraisals by three disinterested appraisers was not met, (2) the accepted purchase price represents the depressed value of the property and is therefore unfair, and (3) the purchasing price does not include any value for the dismissal of the appellants' personal lawsuits. We have already shown the third argument to be without merit, so we consider only the first two.

A

The statute governing private sales of real property by the government pursuant to a tax lien, 28 U.S.C. § 2001 (b), requires that the court "appoint three disinterested persons to appraise such property." Appellants claim that the three appraisers recommended to the district court by the receiver were not disinterested, and therefore, the statutory appraisal rquirement was not met.

Appellants presented, at most, vague assertions of bias on the part of the three appraisers, Messrs. Semple, Carneghi, and Mills. They allege that Semple had previously been retained by Tiburon, so therefore he has an interest in placing the lowest possible value on the land to ensure a low purchase price for the town. But of the three appraisals, his was the highest, which would seem to vitiate this argument. Carneghi has appraised the property before, at the request of the current receiver and his predecessor. Appellants contend that this relationship with the receivers, and "possible fidelity" towards the receivership renders Carneghi "interested." Without more

evidence of actual bias by these appraisers, the fact that they have appraised this property before does not necessarily prove they are "interested" parties.

Appellants' allegations against Mills are the least persuasive. Carneghi's company was previously called "Mills-Carneghi-Bautovich," raising a suspicion in appellants' minds that Mills has been associated with Carneghi in the past. There is no indication that any such past association, if it existed, would be evidence of bias by Mills.

The district court found this evidence wholly unpersuasive, and we agree. The statute calls for the appraisers to be disinterested, but it does not require them to be completely unfamiliar with the property and the dispute. They must simply be impartial and unbiased. Without more, we cannot conclude that the district court clearly erred when it accepted these appraisals.

B

Appellants allege that the accepted purchase price of $6.8 million reflects the depressed value of the property caused by Tiburon's illegal down-zoning, and is therefore an inadequate and unfair price. Thus, appellants reassert their claims against Tiburon, and suggest that the purchase price should reflect the value of the property without the down-zoning. In other words, they argue that they should be compensated as though the Pine Street Corporation has already prevailed in the lawsuits against Tiburon.

By statute, the court must not approve a sale of property pursuant to a tax lien for less than two-thirds of the fair market value. 28 U.S.C. § 2001(b). The district court accepted the purchase price after reviewing three valid appraisals, which show that $6.8 million clearly exceeds two-thirds of the fair market value of the property.

But the purchase agreement also requires the receiver to dismiss the receivership's causes of action against Tiburon. Unlike appellants' meritless personal claims, the

receivership has valid claims against Tiburon. However, any value these claims may have is speculative at best, and the district court did consider the value of the lawsuits when it decided to approve the sale.

An attorney experienced in land use litigation submitted his recommendations to the district court regarding the viability of the lawsuits. He ultimately concluded that there is a low probability of a recovery exceeding the current purchase offer, plus the additional cost of litigation and the continuously accruing interest on appellants' tax liability. Furthermore, the receiver, an experienced real estate attorney, indicated that Tiburon would most likely rescind the purchase offer if it did not include dismissal of the lawsuits. If this offer were rejected then the receiver estimated that a sale to a private developer, if an interested buyer were found, would net far less than the $6.8 million offered. The district court considered this information, and noted that: "After carefully studying the proposed agreement, the receiver's motion and supporting documents . . . I conclude that the proposed sale achieves the highest possible return on the Tiburon property. . . . Even the most optimistic evaluation of the claims shows that it is extremely unlikely that defendants could recover enough damages to offset the high expense and long delay of litigation." District Court's Order of August 18, 1995. On this basis, the district court judge then exercised his discretion to forgo appraisals of the lawsuits.

Under these facts we cannot conclude that the district court abused its discretion in approving the sale. We therefore affirm the district court's order approving the sale of the property to Tiburon for the purchase price of $6.8 million.

IV

For the foregoing reasons, we find that appellants' personal lawsuits are subject to the federal tax lien, and thus, the district court did not abuse its discretion when it

expanded the receivership to encompass the lawsuits. Furthermore, we affirm the district court's order confirming the sale of the property. Therefore, we remand so that the district court may order appellants to dismiss and release any claims they may have against Tiburon in connection with this matter, and we order the emergency stay lifted so that the sale can proceed apace.

AFFIRMED and REMANDED.

APPENDIX B

[Filed Aug. 18, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CV No. 432-44 N.D.Cal.

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

HARRY S. STONEHILL, *et al.*,
Defendants.

OPINION

Plaintiff United States brings this action to foreclose liens against defendants Harry S. Stonehill and Robert P. Brooks, for income taxes and penalties due for 1958 through 1961.

The receiver moves to accept the proposed sale of the receivership's last remaining valuable asset, about 100 acres in Tiburon, California. Defendants oppose the receiver's motion to accept, and move for appraisals of defendants' legal claims against the Town of Tiburon (the Town); complete appraisals of the Tiburon property; and a determination of the scope of the receiver's duties. Defendants also object to portions of the receiver's July 7, 1995 fee request.

I grant the receiver's motion to accept the proposed sale and deny defendants' motions and objection. By separate order, I am setting a confirmation hearing in

San Francisco at the United States District Courthouse on Friday, September 29, 1995, at 10 a.m.

I. Receiver's Motion to Accept Proposed Sale

The receiver moves for acceptance of the proposed sale of the Tiburon property to the Town and the Marin County Open Space District. Defendants oppose the motion. Plaintiff agrees with the receiver.

A. Summary of the Proposed Purchase Agreement

Under the proposed agreement, the Town and the Open Space District (purchasers) would purchase the Tiburon property for $6.8 million. The receiver would dismiss defendants' inverse condemnation claims against the Town. Purchasers would pay $3.5 million at closing, with the balance evidenced by a promissory note maturing March 1, 1997, secured by a deed of trust on 14.6 acres of the property. The Town would provide vested rights to develop 14 residential lots on the land encumbered by the deed of trust. If purchasers default on the promissory note, the receivership may foreclose on the deed of trust.

B. Discussion

Defendants contend that the terms of the proposed sale unreasonably favor the Town. They argue that the Town has an incentive to default on the promissory note because it would retain about 88 acres of open space "for a mere pittance." Defendants contend that the promissory note is not protected by sufficient collateral or penalties for default. They also contend that the property should have been marketed publicly.

After carefully studying the proposed agreement, the receiver's motion and supporting documents, and defendants' objections, I conclude that the proposed sale achieves the highest possible return on the Tiburon property. I have presided over this receivership since 1987.

I am very familiar with the Tiburon property and the legal and political disputes being fought over it. The Town has opposed development on this uniquely attractive property. The receiver has diligently sought development approval while pursuing the legal claims against the Town. Because of the uncertainty and difficulty of obtaining development approval, I am satisfied that no private developer would make a comparable offer. There is relatively little danger of default because Town wants to prevent any development on the property. The collateral for the note is sufficient.

I agree with the receiver that the proposed settlement is the best possible resolution of defendants' legal claims. Even the most optimistic evaluation of the claims shows that it is extremely unlikely that defendants could recover enough damages to offset the high expense and long delay of litigation.

II. Defendants' Motion to Appraise Legal Claims

Defendants move for an order requiring three appraisals of their legal claims against the Town. They cite 28 U.S.C. § 2004, which provides that "[a]ny personality sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 of this title [governing private sales of real property], *unless the court orders otherwise*." (Emphasis added.) Defendants argue that because section 2001 requires appraisals of real property by three disinterested appraisers, section 2004 imposes a similar requirement on private sales of personal property.

The receiver responds that section 2004 does not apply because defendants' legal claims will be dismissed, not "sold." The receiver also argues that section 2004 gives the court discretion to determine the method of sale.

I need not address the interesting issue whether defendants' claims are being sold or dismissed. The statute

gives me discretion to forego appraisals of personal property. As a litigator and trial judge, I have accumulated a fair amount of experience valuing legal claims. With the aid of opinions from several competent attorneys, I have evaluated defendants' claims against the Town. No separate appraisals are needed.

III. Defendants' Motion for Complete Appraisals

Defendants move for complete appraisals of the Tiburon property, contending that the three appraisals submitted by the receiver are deficient.

Under 28 U.S.C. § 2001(b), a federal court conducting a private sale of real property must appoint "three disinterested persons to appraise the property before it can confirm a private sale." *J. Ray McDermott & Co. v. Vessel Morning Star*, 457 F.2d 815, 818 (5th Cir.) (appraisals not required for public, as opposed to private, judicial sale), *cert. denied*, 409 U.S. 948 (1972) (two petitions); *cf. Tanzer v. Huffhines*, 412 F.2d 221, 223 (3d Cir.) (because of corporation's shaky finances and offeror's deadline, court did not abuse discretion in holding private sale of securities without ordering appraisals), *cert. denied*, 396 U.S. 877 (1969). The court may not confirm a private sale "at a price less than two-thirds of the appraised value." 28 U.S.C. § 2001(b).

The statute does not specify the form the appraisals must take. The appraisers here found that the proposed purchase price is at least equal to, if not greater than, the property's fair market value. The appraisals are legally sufficient.

I. Defendants' Motion to Determine Scope of Receiver's Duties

Defendants contend that the receiver has aligned himself with plaintiff, abandoning his role as an impartial officer of the court. Defendants argue that the receiver

should not be allowed to give his opinion on the legal merits of defendants' motions or to communicate with counsel for plaintiff unless defendants are also present.

Plaintiff responds that the receiver was appointed under 26 U.S.C. § 7403 to enforce and foreclose federal tax liens. Plaintiff argues that a receiver appointed under section 7403 acts in lieu of the United States Marshal foreclosing a tax lien, making the receiver in effect an agent of the foreclosing judgment creditor, the United States.

I conclude that the receiver's actions have been entirely consistent with his court-mandated and statutory duties. *See United States v. Peelle Co.*, 224 F.2d 667, 669 (2d Cir. 1955) (proper for temporary receiver to submit affidavit supporting motion to appoint permanent receiver, even though temporary receiver directly benefitted by being made permanent). In 1984, this court appointed the receiver "for the purpose of managing and conserving said assets and businesses [i.e., Pine Street Management Corp., Harroman Co., and Marinship Enterprises] pending sale of said assets and businesses in foreclosure of the aforesaid federal tax liens and so as to realize the greatest and best sale price . . . so as to maximize the recovery by the plaintiff United States on its tax liens." As part of his duties, the receiver should advise the court on anything that might affect the receivership estate, including, for example, defendants' attempts to stay the proposed transaction. The receiver cannot give useful advice without taking positions, which may or may not agree with the positions taken by plaintiff or defendants. The receiver is an officer of the court, but not a surrogate judge. *See United States v. O'Connor*, 291 F.2d 520, 526 (2d Cir. 1961) (receiver appointed under § 7403(d) could not also act as special master).

Because the receiver is an experienced attorney, he is qualified to advise me on the merits of defendants' legal

arguments. I consider the receiver's expertise in local land use law an advantage, not a handicap. *See United Steelworkers of Am. v. Marshill*, 647 F.2d 1189, 1209 (D.C. Cir. 1980) (assistant secretary of labor not disqualified as rulemaker despite expressing views on the disputed issue), *cert. denied*, 453 U.S. 913 (1981) (three petitions). Because the receivership was created to foreclose on plaintiff's tax liens, the receiver may discuss receivership affairs with plaintiff's counsel.

Defendants note that I have previously stated that it made no difference whether or not the receiver was appointed under section 7403. However, I made that statement while addressing defendants' motion to compel receivership files. The distinction does make a difference here.

V. Defendants' Objections to Receiver's Request for Fees

Defendants object to $9,388.75 sought by the receiver for legal work on issues raised by defendants' pending appeal. Because the receiver acted within the scope of his duties, I approve the receiver's July 7, 1995 request for fees.

CONCLUSION

The receiver's motion to accept the proposed sale is granted. There will be a confirmation hearing in San Francisco at the United States District Courthouse on Friday, September 29, 1995, at 10 a.m. Defendants' motions for appraisals of defendants' legal claims against the Town (#); complete appraisals of the Tiburon property (#); and a determination of the scope of the receiver's duties (#) are denied. Defendants' objections (#) to the receiver's July 7, 1995 fee request are denied.

DATED this 18 day of August, 1995.

/s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

[Filed Aug. 18, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CV No. 432-44 N.D.Cal.

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

HARRY S. STONEHILL, *et al.*,
Defendants.

ORDER ACCEPTING OFFER

Upon consideration of the Receiver's Motion to Accept and Confirm Proposed Sale of the Tiburon Property and the record herein, and following a hearing on the Motion, the Court hereby finds that the proposed sale of the Harroman property in Tiburon to the Town of Tiburon and the Marin County Open Space District, pursuant to the Purchase and Sale Agreement presented with the Motion, is in the best interests of the Receivership, and it is hereby

ORDERED, that such offer be accepted, subject to confirmation; and further

ORDERED, that a hearing to confirm such sale shall be held on September 29, 1995, in San Francisco, California, before the United States District Court for the Northern District of California; and further

ORDERED, that the Receiver shall cause to be published in the *Marin Independent Journal*, a newspaper of general circulation in the county in which the property is located, and in *The San Francisco Chronicle*, a newspaper

of general circulation in the City and County of San Francisco, notice of the terms of such sale at least ten (10) days prior to the date of the hearing set forth above. Such notice shall be substantially in the form of *Exhibit A* to this Order.

The Court will consider any bona fide offer that guarantees at least a ten percent (10%) increase over the purchase price of $6,800,000 and that is otherwise on terms at least as favorable to the seller as those described in the Purchase and Sale Agreement.

If the Court confirms the sale following the hearing scheduled for September 29, 1995, it shall issue such additional orders and instructions as are necessary to complete the sale in the manner contemplated in the Purchase and Sale Agreement.

DATED AND ENTERED at Portland, Oregon on August 17, 1995.

/s/ Owen M. Panner
OWEN M. PANNER
United States District Judge

EXHIBIT A

Notice of Private Sale

Notice is hereby given of the proposed private sale of that certain real property commonly known as the Harroman property in Tiburon, California, consisting of approximately 103 acres at the end of Lyford Drive and more particularly described as follows:

Parcel One

Beginning at a point on the Northerly line of the parcel described in the Deed to Felix M. Warburg, recorded June 10, 1958 in Book 1194 of Official Records, at page 374, said point being the intersection of the courses "North 62° 06′ East 767.00 feet" and "South 27° 54′ East 170.00 feet"; thence along said Northerly line, South 27° 54′ East 17.00 feet, South 54° 28′ East 192.00 feet, South 35° 32′ West 275.00 feet and South 04° 52′ West 240.00 feet; thence Southeasterly in a direct line to the intersection of the courses "South 11° 11′ West 157.2 feet" and "South 07° 30′ East 202.2 feet" in the Deed to I. Bartel, recorded May 23, 1955 in Book 943 of Official Records, at page 557; thence along the exterior boundary of the Bartel property, North 11° 11′ East 157.2 feet, North 47° 48′ East 2394 feet, North 34° 28′ East 837 feet and North 55° 19′ 40″ West 1319.06 feet to the Westerly corner of the parcel now or formerly owned and occupied by the United States of Americas, as a coaling station; thence along said exterior boundary, North 63° 12′ 30″ West 777.19 feet to the Northeasterly corner of the parcel described in the Deed to William H. V. Brooke, et ux, recorded December 4, 1958 in Book 1237 of Official Records, at page 580; thence along

the Easterly line of said parcel, South 26° 47′ 30″ West 950.00 feet; thence Southerly in a direct line 1700 feet, more or less, to the point of beginning.

Parcel Two

Non-Exclusive Easement over the portions of the proposed streets or roads shown on the map attached to the Deed to William M. Nelson, Jr., recorded December 10, 1959 in Book 1330 of Official Records, at page 559, for the passage of vehicles of all kinds, for pedestrians and animals and for the installation, operation and maintenance of water, gas and sewer pipelines and for electric transmission and telephone lines and the necessary underground conduits to carry said lines, together with the right to replace, remove and maintain the structures and installations necessary to the enjoyment thereof.

The terms of the proposed sale are as follows: a total purchase price of $6,800,000, of which $3,500,000 is to be paid in cash at closing and the balance ($3,300,000) is to be evidenced by a promissory note due on or before March 1, 1997, secured by a deed of trust on the property. The promissory note provides for interest at an annual rate of one percent (1%) over the prime rate, with all interest and principal due at maturity.

A hearing has been scheduled for September —, 1995, in San Francisco, California, before the United States District Court for the Northern District of California, to confirm such private sale of the Harroman property. *United States v. Stonehill, et. al.*, Case No. 432-44 N.D. Cal. The Court will consider any bona fide offer that guarantees at least a ten percent (10%) increase over the purchase price of $6,800,000 and that is otherwise on terms at least as favorable to the seller as those described above.

This Notice is published pursuant to 28 U.S.C. Section 2001(b).

APPENDIX C

[Filed Oct. 10, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 432-44 N.D.Cal.

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

HARRY S. STONEHILL, *et al.*,
Defendants.

ORDER

It appearing that this Court has heretofore entered a judgment adjudicating that the defendants Harry S. Stonehill and Robert B. Brooks were indebted to the United States for income tax liabilities for the years 1958 through 1961, inclusive, and that this Court did adjudge in said judgment that the United States had tax liens on all assets owned by Harry S. Stonehill and Robert P. Brooks, and that the United States was entitled to foreclose its tax liens on the properties of Messrs. Stonehill and Brooks, including their 100% stock ownership rights in and to the corporations known as Pine Street Management Corporation and The Harroman Company, Inc., and the real property titled in the name of The Harroman Company, Inc. (the "Harroman Property"); and it appearing that the Receiver did bring two (2) lawsuits in the California Superior Court, County of Marin (Marin County Superior Court Civil Actions 144193 and 160899) against the

Town of Tiburon for inverse condemnation and improper down-zoning of the Harroman Property; and it further appearing that the Court did order the Receiver to negotiate a private foreclosure sale of the Harroman Property to the Town of Tiburon and the Marin County Open Space District pursuant to 28 U.S.C. Section 2001, and that the terms of such sale called for dismissal of the Receiver's two suits against the Town of Tiburon, and it appearing that Messrs. Stonehill and Brooks did object to the said sale insofar as it settled the lawsuits against the Town; and it further appearing that Messrs. Stonehill and Brooks have claimed that they have some unidentified personal claims as plaintiffs in said lawsuits against the Town for inverse condemnation and down-zoning of the Harroman Property; and it appearing that this Court on April 6, 1995, did file an Order adjudging that any such rights of Messrs. Stonehill and Brooks, if they exist, are encumbered by the involved federal tax liens, are subject to foreclosure in this suit and are part of the Receivership estate; and it appearing that this Court on August 18, 1995 did order the purchase bid of the Town of Tiburon and the Marin County Open Space District be accepted in foreclosure of the tax liens on the Harroman Property, which purchase bid called for dismissal of the two aforesaid suits brought by the Receiver against the Town of Tiburon; and it further appearing that Messrs. Stonehill and Brooks did prevail upon Mr. Jacobsen (the attorney retained by the Receiver herein to bring Civil Action No. 160899 in the Superior Court for Marin County) to substitute for himself Huey P. Cotton to represent Messrs. Stonehill and Brooks, whereby the Receiver lost control of Civil Action No. 160899 in the Superior Court of Marin County, and whereby the Receiver, John M. Collette, is unable to dismiss that action so as to consummate the sale to the Town of Tiburon pursuant to this Court's August 18, 1995 Order; and it appearing that Messrs. Stonehill and Brooks thereafter sought a stay in the Superior Court of Marin County in Civil Action No. 160899

of any dismissal or other action in that suit; and whereas it appears that Messrs. Stonehill's and Brooks' actions in this regard were in derogation of and designed to frustrate this Court's foreclosure of the said tax liens on Messrs. Stonehill's and Brook's rights in and to the Harroman Property and to frustrate this Court's Orders of April 6, 1995 and of August 18, 1995 mentioned above, and in order to facilitate the Receiver's consummation of the foreclosure sale of the Harroman Property, it is hereby

ORDERED that Messrs. Stonehill and Brooks and their attorneys Huey P. Cotton, Esq. and Robert E. Heggestad, Esq. procure and deliver forthwith, and in no event later than five days after September 28, 1995, to the Receiver, John M. Collette, Motions for Dismissal with Prejudice (designated in the California State Court system as Requests for Dismissal with Prejudice) of Civil Action Nos. 160899 and 144193 in the Superior Court for Marin County executed by both Harry S. Stonehill and Robert P. Brooks, and it is further

ORDERED that Harry S. Stonehill, Robert P. Brooks, and their attorneys Huey P. Cotton, Esq. and Robert E. Heggestad, Esq. forthwith, and in no event not later than five days after September 28, 1995, deliver to the Receiver, John M. Collette, releases of claims in the form attached hereto as *Exhibit A*, executed by Harry S. Stonehill and Robert P. Brooks, whereby the Town is released from all claims which Messrs. Stonehill and Brooks may have against the Town relating to or arising from the Harroman Property, and it is further

ORDERED that the Receiver, John M. Collette, acting for this Court, shall thereafter deliver said Requests for Dismissal with Prejudice and Releases to the Town of Tiburon pursuant to this Court's separate order being entered contemporaneously herewith; and it is further

ORDERED that Harry S. Stonehill, Robert P. Brooks, and their attorneys Huey P. Cotton, Esq. and Robert E.

Heggestad, Esq. forthwith, and in no event not later than five days after September 28, 1995, file with the Marin County Superior Court in Civil Action 160899 a withdrawal of the motion for a stay which counsel for Harry S. Stonehill and Robert P. Brooks filed therein, and that proof of the filing of said withdrawal of that motion be given forthwith to the Receiver, John M. Collette; and it is further

ORDERED that Harry S. Stonehill, Robert P. Brooks, and their attorneys Huey P. Cotton, Esq. and Robert E. Heggestad, Esq., hereafter (i) refrain from taking any action to impede or interfere with the execution of this Court's orders pertaining to sale of the Harroman Property and dismissal of Civil Action Nos. 160899 and 144193, and (ii) take any other action and execute and deliver any other documents as the Plaintiff United States may request to effectuate fully the purposes of this Order; and it is further

ORDERED that this order is effective as of September 28, 1995, the date on which this Court rendered an oral order in open court of identical tenor to defendants Stonehill and Brooks and their attorneys Huey P. Cotton, Esq. and Robert E. Heggestad, Esq.

DATED: October 10, 1995

/s/ Owen M. Panner
OWEN M. PANNER
United States District Judge

EXHIBIT A

RELEASE

The undersigned, Harry S. Stonehill, hereby releases and forever discharges the Town of Tiburon, its officers, representatives and elected officials, from any and all claims, demands or actions made in or relating to *The Harroman Company, Inc., et al. v. Town of Tiburon*, Case No. 160899 in the Superior Court for Marin County, and *The Harroman Company, Inc., et al. v. Town of Tiburon*, Case No. 144193 in the Superior Court for Marin County, or otherwise relating to the property commonly known as the Harroman Property in Tiburon, California. This Release is executed for delivery to the Town of Tiburon pursuant to the Order of the United States District Court for the Northern District of California entered in open court on September 28, 1995.

Dated: October —, 1995

HARRY S. STONEHILL

RELEASE

The undersigned, Robert P. Brooks, hereby releases and forever discharges the Town of Tiburon, its officers, representatives and elected officials, from any and all claims, demands or actions made in or relating to *The Harroman Company, Inc., et al. v. Town of Tiburon*, Case No. 160899 in the Superior Court for Marin County, and *The Harroman Company, Inc., et al. v. Town of Tiburon*, Case No. 144193 in the Superior Court for Marin County, or otherwise relating to the property commonly known as the Harroman Property in Tiburon, California. This Release is executed for delivery to the Town of Tiburon pursuant to the Order of the United States District Court for the Northern District of California entered in open court on September 28, 1995.

Dated: October —, 1995

ROBERT P. BROOKS

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CV 43244

UNITED STATES OF AMERICA,

v.

HARRY S. STONEHILL, *et al.*,
Defendants.

ORDER

PANNER, J.

Plaintiff United States brings this action to foreclose liens against defendants Harry S. Stonehill and Robert P. Brooks for income taxes and penalties due for 1959 through 1961. Plaintiff moves to expand the scope of the receivership. I grant plaintiff's motion.

BACKGROUND

In 1980, this court entered judgment against defendants for unpaid income taxes and fraud penalties. *United States v. Stonehill*, 420 F. Supp. 46 (C.D. Cal. 1976) (Solomon, J., from the District of Oregon), *aff'd in part*, 702 F.2d 1288 (9th Cir. 1983) (affirming except on disposition of certain third-party interests), *cert. denied*, 465 U.S. 1079 (1984). The judgment allowed plaintiff to foreclose its tax liens on defendants' assets in this court's jurisdiction.

In 1984, this court appointed a receiver, Jerome Katzin, to oversee the sale of defendants' assets to satisfy

plaintiff's tax liens. In 1993, at Katzin's request, I appointed John Collette to replace Katzin as receiver.

Defendant's assets include the Pine Street Management Corp. (Pine Street). Pine Street owns the Harroman Co., which in turn owns 101 undeveloped acres in Tiburon, California. The Tiburon property and the legal claims associated with it are the last valuable assets under the receivership.

The receivers have negotiated for years with the Town of Tiburon (the Town) seeking approval for zoning and development plans. The receivers also have brought two legal actions against the Town, seeking $30 million in damages caused by allegedly improper down-zoning. Defendants here are among the plaintiffs in those actions.

In late 1994, the Town and the Marin County Open Space District offered to purchase the Tiburon property and settle the pending lawsuits for $6.8 million. Defendants concede the receiver's authority to sell the Tiburon property, but contend that they have personal claims against the Town which are not under the receiver's control.

DISCUSSION

Plaintiff moves to expand the receivership to include "all rights and causes of action which Harry S. Stonehill and Robert P. Brooks have against the Town of Tiburon arising from the Town's down-zoning and other actions concerning the tract of land involved herein." Without conceding that defendants have separate personal claims against the Town, plaintiff contends that I should expressly extend the receiver's authority to include any personal claims defendants may have. Defendants respond that their personal claims against the Town are not subject to foreclosure unless and until they recover damages.

Assuming for this motion that defendants have separate personal claims against the Town, I conclude that federal tax liens are more than broad enough cover any such

claims. Federal tax liens apply to "all property and rights to property, whether real or personal, belonging to [the taxpayer]." 26 U.S.C. § 6321. Congress wanted federal tax liens "to reach every interest in property that a taxpayer might have," *In re Kimura*, 969 F.2d 806, 810 (9th Cir. 1992), including unliquidated legal claims. *See, e.g., United States v. Hubbell*, 323 F.2d 197, 200 (5th Cir. 1963) (tax lien encumbered taxpayer's unliquidated tort claim); *Bensinger v. Davidson*, 147 F. Supp. 240, 245 (S.D. Cal. 1956) (taxpayer's settlement with third party did not cut off tax lien on taxpayer's unjust enrichment claim).

I conclude that under these facts, the receiver must have express authority to settle any personal claims defendants may have against the Town. Otherwise, defendants' apparent insistence on pursuing those claims could jeopardize the sale of the property.

Defendants argue that the $6.8 million purchase price for the Tiburon property is inadequate because only $100,000 is allocated to settle claims for $30 million. However, the offer is an undivided lump sum. I address the offer's adequacy in other proceedings.

CONCLUSION

Plaintiff's motion to expand the scope of the receivership (#) is granted.

IT IS SO ORDERED.

DATED this 6 day of April, 1995.

/s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

APPENDIX E

[Filed Jul. 24, 1996]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-17019
D.C. No. CV-95-43244-OMP

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HARRY S. STONEHILL; ROBERT P. BROOKS,
Defendants-Appellants.

ORDER

Before: BOOCHEVER, HALL and FERNANDEZ, Circuit Judges.

Appellants' petition for rehearing has been reviewed by the Court and is hereby DENIED.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 432-44 N.D. Cal.

UNITED STATES OF AMERICA,
Plaintiff,

v.

HARRY S. STONEHILL, *et al.*,
Defendants.

DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER OF DECEMBER 19, 1994

Pursuant to Rule 59 (e) of the Federal Rules of Civil Procedure, Defendants, Harry S. Stonehill and Robert P. Brooks, by and through counsel, hereby submit this motion requesting reconsideration of the ruling in the Order dated December 19, 1994, and for reasons states as follows:

1. At the December 2, 1994 hearing in Portland, Oregon, Judge Panner directed Defendants' counsel to submit separate opinion letters analyzing the viability of the lawsuit against the Town of Tiburon ("Tiburon") (*Harroman, et al v. Town of Tiburon,* No. 160899) ("Tiburon Litigation"), with consideration of the most recent offer from Tiburon and the Marin County Open Space District to purchase the Harroman Property and settle the pending litigation for $6,800,000.

2. Counsel for Defendants in the Tiburon litigation, Frederik A. Jacobsen, Esq., submitted an opinion letter to this Court on December 16, 1994, in which he con-

cluded that Defendants possess and maintain a viable claim against Tiburon for improper precondemnation activity. *See* December 16, 1994 letter to The Honorable Owen M. Panner from Frederik A. Jacobsen ("Jacobsen Letter") at 2.

3. Mr. Jacobsen, who possesses a vast amount of experience in litigating precondemnation claims, based his conclusion as to the viability of Defendants' claims on the dozens of cases employing this theory of liability which he has tried during the past ten years. *See* Jacobsen Letter at 4. As acknowledged in the United States' response to Mr. Jacobsen's letter, "[Mr. Jacobsen] must be deemed to be one of the most, if not the most knowledgeable attorneys concerned with this suit." United States' Response to Informative Letter of Frederik A. Jacobsen, Esq. ("United States Response") (filed December 19, 1994) at 1.

4. Following receipt of Mr. Jacobsen's December 16, 1994 opinion letter, Mr. Heggestad, pursuant to Judge Panner's Order, submitted an opinion letter to this Court on December 19, 1994, which presented, *inter alia*, an analysis which incorporated the opinions contained in Mr. Jacobsen's letter, as to the viability of the Tiburon Litigation and Defendants' objection to settlement of the Tiburon law suit for an amount of approximately $100,000 (*i.e.*, $900,000 less the value of four additional lots). *See* December 19, 1994 letter to The Honorable Owen M. Panner from Robert E. Heggestad, Esq. ("Heggestad Letter") at 3-4.

5. In the United States' Response, Mr. McCarthy, in response to Mr. Jacobsen's opinion letter, argued that: (1) "the only issue before this Court is whether the merits of the precondemnation theory outweigh the offer now before this court"; (2) "that there is no known admissible evidence that such an intent existed in 1989 and that it will be impossible to prove the adoption of the General Plan was directed specifically at the down zoning . . .";

(3) that "the only evidence of intent occurr[ed] in 1993 and 1994" and that "it is unreasonable to infer the 1989 existence of such an interest from facts occurring 4 or 5 years later when even the Town's government contained a different personnel." United States' Response at 2-3.

6. The United States concludes by stating that expending $200,000 to $300,000 to complete the litigation, and deferring the conclusion of the Receivership for nearly five years as opposed to accepting the recent offer is unreasonable. *Id.* at 4.

7. In assessing the strength of Defendants' claim against Tiburon for improper precondemnation activity, however, Mr. Jacobsen stated that the California Court of Appeals in its 1991 Opinion in the previous litigation "properly recognized that the resolution of this liability theory is inherently factual." Jacobsen Letter at 2.

8. As further evidence of the factual nature of a claim based on precondemnation, Mr. Jacobsen cites a case which he recently tried, *Del Monte Dunes v. City of Monterey,* 920 F.2d 1496, 1508-09 (9th Cir. 1990), which "establishes the same principle under Federal Law." *Id.*

9. Mr. Jacobsen stated that although some evidence from 1993 and 1994 exists which could be used to prove that Tiburon's activities resulted in precondemnation of Defendants' property, "the trier of fact w[ould] have to draw an inference based upon this . . . evidence that the Town's acquisitive intent existed in 1989." *Id.*

10. As a caveat, however, Mr. Jacobsen brought to the Court's attention the fact that all of the evidence which Defendants have in support of their claims has been obtained "without the benefit of discovery . . . ." *Id.* No factual discovery has been conducted to date.

11. Given Mr. Jacobsen's well supported conclusion concerning the factual nature of Defendants' precondem-

nation theory and the lack of any discovery to date in the Tiburon Litigation, Defendants argued that they "should be at least allowed to proceed with discovery before being required to dismiss the litigation . . . ." Heggestad Letter at 4.

12. Notwithstanding the conclusions set forth in these opinion letters regarding the fact that no discovery has been taken to garner evidence in support of Defendants' "inherently factual claim", on December 19, 1994, this Court ordered the Receiver, John M. Collette, Esq., to proceed in accordance with his recommendation to sell the Harroman Property for $6,800,000 and to settle the pending litigation against Tiburon. *See* Order (filed December 19, 1994) attached to Receiver's November 22, 1994 Request For Instructions Concerning Tiburon Property at 7.

13. Although Mr. Jacobsen stated that Tiburon's acquisitive intent in 1989 would have to be inferred by the jury based on the evidence which Defendants *now* have, he concluded that "[w]e have a viable precondemnation theory which could result in a 1989 date of value." Jacobsen Letter at 4.

14. This conclusion is in direct contradiction to the Government's position that any inference of acquisitive intent as of 1989 would be unreasonable. *See* United States' Response at 3.

15. Allowing Defendants to proceed with discovery in the Tiburon Litigation, therefore, would serve the purpose of obtaining evidence that Tiburon's acquisitive intent did in fact exist in 1989, thereby establishing an even stronger argument for liability as of that date.

16. The right of a party to conduct discovery is well-established in American jurisprudence. *See, e.g., United States v. Bryan*, 339 U.S. 323, 331 (1950) ("For more than three centuries it has now been recognized that the public is *entitled* to every man's evidence.") (emphasis

added); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) ("wide access to relevant facts serves the integrity and fairness of the judicial process by promoting the search for the truth").

17. Given the fact that Defendants have not had the opportunity to conduct *any* discovery in the Tiburon Litigation, and the fact that the Receivership, without accounting for Mr. Jacobsen's fees, has spent in excess of several hundred thousand dollars in connection with the Tiburon litigation during the past several months, it is inequitable to require Defendants to settle their law suit for an amount of approximately $100,000 (*i.e.*, $900,000 less the value of four additional lots). *See* Heggestad Letter 3-4.

18. Moreover, ordering such a settlement without the benefit of discovery deprives Defendants of their right to discovery as set forth by the United States Supreme Court in *Bryan*, 339 U.S. at 331.

19. Similarly, such an order does not preserve the principles underlying the right of a party to conduct discovery as articulated by the United States Court of Appeals for the Ninth Circuit in *Shoen*—that is—to protect the integrity and fairness of the judicial process and to promote the search for the truth. *Shoen*, 5 F.3d at 1292.

20. Defendants have a constitutional right to sue Tiburon on a claim of unconstitutional taking of their property. *See Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) ("standing to sue" means that the party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy).

WHEREAS, for the reasons set forth above, Defendants respectfully request that this Motion for Reconsideration of the December 19, 1994 Order be granted, and that the Receiver be ordered to reject the $6,800,000 purchase and settlement offer.

Respectfully submitted,

/s/ Robert E. Heggestad
ROBERT E. HEGGESTAD
HEGGESTAD & WEISS
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Telephone: (202) 289-8333
Attorneys for Defendants
Harry S. Stonehill and
Robert P. Brooks

Dated: January 3, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 432-44 N.D. Cal.

UNITED STATES OF AMERICA,
Plaintiff,

v.

HARRY S. STONEHILL, *et al.*,
Defendants.

STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' MOTION FOR
RECONSIDERATION OF ORDER OF
DECEMBER 19, 1994

Federal Rules of Civil Procedure, Rule 59(e).

Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993).

Sierra Club v. Morton, 405 U.S. 727, 732 (1972).

United States v. Bryan, 339 U.S. 323, 331 (1950).

Respectfully submitted,

/s/ Robert E. Heggestad
ROBERT E. HEGGESTAD
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Telephone: (202) 637-4880
Attorneys for Defendants
Harry S. Stonehill and
Robert P. Brooks

Dated: January 3, 1995

APPENDIX G

LAW OFFICES OF
FREDERIK A. JACOBSEN
520 South El Camino Real, Suite 630
San Mateo, California 94402
Telephone: (415) 375-8991

December 16, 1994

Federal Express

The Honorable Owen M. Panner, Judge
United States District Court
335 United States Courthouse
Portland, OR 97205

Re: Proposed Settlement of The Harroman Company, Inc. v. Town of Tiburon, Marin County Superior Court #160899

Dear Judge Panner:

I have been requested as trial counsel for plaintiffs in the captioned action to address some substantive aspects of this litigation as they may bear on the proposed settlement of it. The areas that I have been asked to address are contained in Mr. Collette's December 6, 1994 letter and Mr. Heggestad's December 9, 1994, letter. Although you were copied on these letters, I have attached them to this letter for convenient reference.

The Prospects of Prevailing on the Litigation Claims

The most important liability theory advanced in our complaint is that the Town of Tiburon used its regulatory powers to aid public acquisition of the subject property at a depressed price (hereafter referred to as our "pre-condemnation theory"). Local governments can use their police power to regulate a wide spectrum of land uses, but they cannot employ the regulatory power to depress prop-

erty value in aid of public acquisition: *Klopping v. Whittier*, (1972) 8 Cal.3d 39; *Kissinger v. City of Los Angeles*, (1958) 161 Cal.App.2d 454; *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir. 1983).

Our precondemnation theory is important because it will be difficult to establish the irrationality or arbitrariness of the downzonings (and ultimate approval in 1994 of a 19-lot subdivision) based on lack of evidentiary record in support thereof. Moreover, even if the 1994 approval of 19 lots is found to be improper, our date of value would necessarily be in 1994. Based on the appraisals the Receiver has commissioned for 1994, it is unlikely that we could improve on the settlement offer by basing damages on 1994 values.

The starting point for analyzing the viability of our precondemnation theory is the October 18, 1991 Opinion by the California Court of Appeal in the previous litigation. That decision sustained a demurrer against us on several theories. However, as to unreasonable precondemnation activity, the Court of Appeal reversed the demurrer (Slip Opinion, pp. 18-20—I refer to the Slip Opinion because this portion of the Opinion was not published in the Officer Reporter). The Court of Appeal held that the allegations of the cause of action alleging unlawful precondemnation activity were sufficient to state a cause of action (*Id.* at 19) and refused to "speculate on the facts, if any, that plaintiffs will be able to produce to support the allegations." (*Id.* at 20)

The importance of this holding is that the Court of Appeal has properly recognized that the resolution of this liability theory is inherently factual. A recent case I tried establishes the same principle under federal law. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508-09 (9th Cir. 1990) [reversing a summary judgment in the defendant city's favor—the January, 1994 trial resulted in a $1.5 million jury verdict which represented 90% of claimed damages].

In reversing the demurrer, the Court of Appeal also recognized that the alleged improper precondemnation activity may have occurred in 1989. Thus it would become a factual issue whether we could prove the Town of Tiburon's 1989 adoption of the General Plan was intended to improperly aid acquisition of the property.

The evidence of such an improper intent now known to us without benefit of discovery largely occurred in 1993 and 1994. Our theory would therefore be that the efforts to restrict the density of the property involved a course of conduct beginning in 1989 and continuing through the present. Thus, the trier of fact will have to draw an inference based upon this circumstantial evidence that the Town's acquisitive intent existed in 1989. Obviously, this adds difficulty to the case.

In general, evidence of illegal attempts to aid public acquisition of property must demonstrate more than simply citizen input or mere planning for the future. Evidence must show an official government policy to aid acquisition of property that substantially interferes with the value of the property.

Our more recent evidence appears to satisfy that standard if believed by the jury and if the jury infers that the Town's acquisitive intent existed in 1989. I am referring to evidence that the Town of Tiburon in 1993 entered into a joint powers agreement with other public agencies for the purpose of acquiring the subject property, a bond issue being passed in 1993 to acquire the property, and communications in 1994 from the public agencies (as opposed to the citizenry) to various federal officials urging those federal officials to interfere with the development plans for the property and force a sale of the property to the public agencies.

Although I have not scrutinized the appraisals of the subject property with a 1989 date of value, those two appraisals have been performed and indicate a value either ten or twenty-five million dollars.

Time Required to Resolve the Litigation

If this matter were to proceed to trial, I would expect that trial to occur within one year. If successful, the Town of Tiburon would undoubtedly appeal any judgment against it. An appeal in the state court system would likely consume at least 18 months and probably two years. If further appeals were taken to the California or United States Supreme Court, and either of those courts granted review, another year or two would be consumed.

The Likelihood of Obtaining Damages

In other cases involving this issue that I have personally been involved with, a possible damages scenario is as follows. We would argue that the Town of Tiburon's improper regulatory conduct in aid of acquisition resulted in a taking of the property as of 1989. We would value the property as of that date, and the Town would receive a deed to that property. The jury would be instructed that the Town was receiving a deed in exchange for just compensation of the subject property. I successfully employed this approach in *Blosser v. City of Fresno* (Fresno Superior Court #375627-7). Another case on which I have consulted, although I am not counsel of record, *Ambrose v. City of Laguna Beach*, Orange County Superior Court #45-74-73, successfully employed the same approach.

The advantage to this approach, in my experience, is that jury is aware that the governmental defendant is receiving a deed to the property in exchange for the just compensation to be awarded. Thus it is more likely that the jury will award a higher amount because the Town is receiving the equivalent of that amount when it receives the deed to the subject property.

If we establish a date of value in 1989, we would be entitled to interest on the just compensation from that date of trial.

Concerning consequential damages, the Federal Civil Rights Act (42 USC § 1983) allows for such damages. In the *Blosser* case mentioned earlier, I received a jury award of consequential damages based upon interest accruing on loans taken out by the property owners using the subject property as collateral. The theory in *Blosser* was that the City of Fresno's illegal precondemnation activity prevented a sale of the property in order to pay off the loans, and thus the accruing interest was recoverable.

It should be noted that the property owners in this case could not recover both interest on a 1989 value and consequential damages. Such an award would be duplicative.

Mr. Collette's December 13, 1994 letter notes that the Town could argue that its 1989 zoning might have resulted in a low density range of approximately 20 units. If we were successful in establishing date of value in 1989, that value would be premised on the highest and best of the subject property. The Town could certainly argue that its zoning would reduce that value. However, we would be entitled to argue (and the jury would be instructed) that it must ignore the effect of the project (acquisition of the property) on value. Thus, a jury which found liability based on the Town's improper precondemnation conduct might well disregard the Town's argument that damages should be reduced because the Town would have otherwise reduced density.

Recovery of Litigation Expenses

If we prevailed in this action, the Federal Civil Rights Act mandates recovery of attorneys' fees and expert fees. (42 USC § 1983). The amount of the fee award is subject to the trial court's discretion in determining a recoverable award.

I have also been requested to estimate the amount of fees and costs to try this case to verdict. Based on my experience in approximately a dozen cases such as this that I have tried over the past ten years, I estimate those

fees and costs (including experts) to be $200,000 to $300,000.

Conclusion

We have a viable precondemnation theory that could result in a 1989 date of value. When I say "viable", I do not mean to suggest that the case is without difficult challenges. In my own personal experience, I have achieved multi-million dollar jury verdicts in roughly a half dozen such cases over the last ten years. During that same period, I have suffered dismissals short of verdict in approximately a dozen cases.

The law governing this type of action is, as the United States Supreme Court itself has observed, is not a model of clarity. Decisions in these types of cases are always based on the particular facts of the case. One of the confusing aspects of this type of litigation is whether some formal announcement of governmental intention to acquire is a necessary precursor, and if so, what constitutes such action. Courts have not reached a consistent answer. Thus, we have some exposure to a pretrial dismissal if the trial court finds that we have fallen short of proving intention to acquire. Because of the inherently factual nature of this type of litigation, it is difficult to assess success in percentage terms. I believe that we have a viable precondemnation theory because there is legal precedent to support our theory, and our evidence could support a jury verdict, *if* we can get to a jury, but I believe it will be difficult to win on a theory that establishes liability and damages as of 1989.

I have not addressed the viability of our other causes of action which challenge the 1994 approval of 19 lots because, even if viable, I don't believe that damages based on a 1994 date of value would exceed by a meaningful amount the settlement offer.

If I can be of further assistance, please advise me.

Sincerely yours,

/s/ Frederik A. Jacobsen
FREDERIK A. JACOBSEN

Enclosures

cc: John Collette (w/o enc.)
Robert Heggestad (w/o enc.)
John L. McCarthy (w/o enc.)
Harry S. Stonehill (w/o enc.)

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No. 96-279

In the Supreme Court of the United States

OCTOBER TERM, 1996

HARRY S. STONEHILL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution affords persons whose property is under the control of a receiver the right to pursue litigation involving that property after the receiver, with the approval of the district court, settled the litigation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 83 F.3d 1156. The opinions and orders of the district court (Pet. App. 13a-18a, 19a-22a, 23a-28a, 29a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1996. The petition for rehearing was denied on July 24, 1996 (Pet. App. 32a). The petition for a writ of certiorari was filed on August 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After an audit, the Commissioner of Internal Revenue determined that there were substantial deficiencies in petitioners' income tax for the taxable years 1958 through 1961 and that petitioners were liable for civil penalties due to fraud. In January 1966, the Commissioner made jeopardy assessments against petitioners. The United States then filed actions to reduce those assessments to judgment, to set aside certain fraudulent conveyances and to foreclose the tax liens on property owned by petitioners.[1] In 1980, the district court determined the amounts of petitioners' tax liabilities. In 1983, that determination was affirmed on appeal. *United States* v. *Stonehill*, 702 F.2d 1288, 1290-1293 (9th Cir.), cert. denied, 465 U.S. 1079 (1984).

The judgment in that case allowed the United States to foreclose on petitioners' assets. Since that judgment was rendered and the amount of the tax liabilities was determined, the United States has been seeking satisfaction of petitioners' unpaid federal tax liabilities through the foreclosure process (Pet. App. 29a).

In 1984, at the request of petitioners, the district court appointed a receiver to manage the assets and businesses of petitioners pending the tax lien foreclosure sales. These businesses included the Pine Street Corporation, which owned a parcel of real estate located in the Town of Tiburon, California (Pet. App. 2a, 16a). That real estate had a substantial value

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[1] These procedures were initiated prior to the enactment of 26 U.S.C. 7429, which provides for expedited administrative and judicial review of such assessments.

because of its suitability for residential development (*id.* at 2a).

From 1988 to 1994, the receiver, acting on behalf of Pine Street Corporation, submitted several applications to the Town of Tiburon for approval of a development plan for the real estate. During that period, however, Tiburon modified its General Development Plan to permit only less intensive development than had previously been allowed. The receiver challenged the validity of the new zoning plan in litigation brought in California state court against Tiburon on behalf of petitioners and Pine Street Corporation.[2] The receiver alleged that the zoning changes effected an inverse condemnation of the property and were invalid under state law (Pet. App. 2a-3a).

The parties attempted to settle this zoning dispute. After lengthy negotiations, the Town of Tiburon and the Marin County Open Space Committee offered to purchase the real estate for $6.8 million. This offer was, of course, subject to the condition that the receiver dismiss the lawsuits against the Town of Tiburon. When the offer was presented by the receiver to the court for approval, petitioners objected to the settlement. They contended that they should be allowed to conduct discovery concerning whether Tiburon had rezoned the property for the purpose of reducing its value so that Tiburon could then acquire

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[2] The lawsuits named the Harroman Company as the corporate owner of the property. The Harroman Company, however, was merged into the Pine Street Corporation effective May 31, 1966, before either lawsuit was filed. As a result of the merger, the Pine Street Corporation was the beneficial owner of the real estate that was the subject of the lawsuits and was the real party in interest (CR 984).

it. The district court denied petitioners' motion (Pet. App. 3a, 33a-39a).

Petitioners thereafter contended that they had personal claims against Tiburon that were not under the receiver's control. The United States then filed a motion to expand the receivership to encompass petitioners' personal claims against Tiburon. The district court granted that motion (Pet App. 3a, 29a-31a) and subsequently confirmed the proposed private sale of the land to Tiburon after a hearing. In the order confirming the sale, the district court further directed petitioners to dismiss their personal claims against Tiburon (*id.* at 3a, 19a, 23a-26a).

2. The court of appeals affirmed (Pet. App. 1a-11a). Petitioners conceded that any claim for damages from Tiburon for the decrease in property value caused by the allegedly improper zoning was controlled entirely by the receiver. They claimed, however, that they were personally entitled to pursue a claim against Tiburon for recovery of the interest that accrued on their federal tax debt during the period that a sale of the property had been delayed by the allegedly unlawful zoning. Petitioners also contended that the district court erred in confirming the sale because the real estate appraisers were not disinterested and because the purchase price was not adequate (*id.* at 7a-8a).

The court of appeals held that all of petitioners' claims against Tiburon were personal property subject to attachment and foreclosure (Pet. App. 4a-6a). The court further held that the claims had no value and that the district court thus did not abuse its discretion when it ordered petitioners to dismiss those claims (*id.* at 7a-8a). The court noted that petitioners did not personally own the property that gave

rise to the claims and that, as shareholders, they had no right to bring a personal action for injury to the corporation or its property. The court held that "the causes of action against Tiburon belong[ed] solely to Pine Street Corporation" and that petitioners "had no valid personal claims against Tiburon, regardless of the fact that they are named in the complaints in their individual capacities" (*id.* at 7a).

The court also rejected petitioners' contentions that the real estate appraisers were not disinterested and that the price paid for the property was inadequate (Pet. App. 8a-10a). The court pointed out that "[a]n attorney experienced in land use litigation * * * ultimately concluded that there is a low probability of a recovery exceeding the current purchase offer, plus the additional cost of litigation and the continuously accruing interest on [petitioners'] tax liability" (*id.* at 10a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

Petitioners do not dispute that the United States is entitled to foreclose upon and sell their property in satisfaction of their long outstanding tax debts (Pet. 13). Petitioners instead contend (Pet. 13-21) that they were denied due process of law when the district court did not allow them to conduct discovery in the actions filed by the receiver. That contention is without merit.[3]

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[3] The issue that petitioners raise in their petition was not adequately raised in the court of appeals. The claim that additional "discovery" was required by the Due Process Clause was

Petitioners do not own the property involved in the litigation that the receiver commenced and subsequently settled. They are only shareholders of the corporation that owned the property, and their shares in that corporation are held by the receiver. Moreover, as the court of appeals pointed out (Pet. App. 6a), *if* petitioners had a cause of action, that right of action was also "property" subject to the government's lien and was thus also one of the assets transferred to the receiver for liquidation. Under the applicable state law, petitioners thus had no right to pursue any cause of action independently of the receiver. See *Sutter* v. *General Petroleum Corp.*, 170 P.2d 898, 900-901 (Cal. 1946); *Jones* v. *H.F. Ahmanson & Co.*, 460 P.2d 464, 469-471 (Cal. 1969); *Kruse* v. *Bank of America*, 248 Cal.Rptr. 217, 233 (Cal. App. 1988), cert. denied, 488 U.S. 1043 (1989). Moreover, as the court of appeals stated, "[w]ell-established principles of corporate law prevent a shareholder from bringing an individual direct cause of action for an injury done to the corporation or its property by a third party" (Pet. App. 7a). Petitioners have no valid personal claims against Tiburon, and the Due Process Clause does not entitle a person to conduct discovery on a claim that is foreclosed as a matter of law.

Moreover, petitioners had no right to conduct discovery with respect to the claims of the Pine Street Corporation. The receiver, not petitioners, had exclu-

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first raised as a separate issue in the petition for rehearing in the court of appeals. Issues raised for the first time at that late stage of the proceedings are generally deemed waived. See *Hightower* v. *Texas Hosp. Ass'n*, 73 F.3d 43, 44 (5th Cir. 1996); *DeWeerth* v. *Baldinger*, 38 F.3d 1266, 1274 (2d Cir.), cert. denied, 115 S. Ct. 512 (1994); *United States* v. *Lewis*, 798 F.2d 1250 (9th Cir. 1986).

sive control over the stock of the Pine Street Corporation and was authorized to manage and conserve the assets of that corporation pending sale of the assets in foreclosure (Pet. App. 16a). See *Loeb* v. *Berman*, 20 P.2d 685, 686 (Cal. 1933).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The government's brief seeks to convey an image of the Petitioners as disinterested participants in this proceeding which began almost thirty-one years ago. The image which the government has now conjured up depicts Petitioners as shareholders with no rights regardless of how the government chooses to dispose of their last remaining assets. According to the government, the District Court's decision, which directs the Petitioners and Pine Street Corporation to dismiss the litigation against Tiburon, cannot be a denial of due process because the "Petitioners have no valid personal claims against Tiburon", and because "the due process clause does not entitle a person to conduct discovery on a claim that is foreclosed as a matter of law." (Opp. at 6) Without proffering any legal support for this contention, the government hopes thus to convince this Court

that this is hardly a case in which due process protection for taxpayers, who are "mere shareholders" in a corporation controlled by a Receivership, need be proclaimed. This image, however, is as false as it is irrelevant.

The law affords a shareholder standing to make a constitutional challenge for violation of due process rights where as in the instant case, the shareholder suffers a devaluation of stock and is deprived of property without due process of law. *See e.g. Beerly v. Department of Treasury,* 768 F.2d 942, 948 (7th Cir. 1995) (Shareholder granted standing to raise constitutional challenge on due process grounds based on deprivation of property, *i.e.,* devaluation of stock, because of allegedly unreasonable valuation procedure.) The Petitioners did not concede, as suggested by the government, or as found by the Court of Appeals, that they were not "entitled to collect damages from Tiburon for the decrease in property value caused by the allegedly improper zoning." (App. A at 7a). Before the Court of Appeals, the Petitioners conceded *only* that individual corporate shareholders "as a general principle" cannot sue a third-party wrongdoer for injuries to the corporate entity because "corporate injuries necessarily result in diminished corporate value, which in turn causes all shareholders to suffer a common harm, *i.e.,* a decrease in the value of their stock."[1] Appellants' Reply Brief at 1. The devaluation of Pine Street Corporation's remaining assets, the proceeds of which are required to be directly applied against Petitioners' tax liability, constitutes an injury to the Petitioners, who, along with their former wives, are the sole shareholders of the corporation.

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[1] Before the Court of Appeals, Petitioners argued that they fell within the exception to this general rule because they have suffered a separate and distinct injury arising from the compounded accrual of interest on their tax liability.

Petitioners' claim of a denial of due process is not dependent upon their right to pursue a direct cause of action in litigation against Tiburon. The interested and named parties in the litigation against Tiburon, are both the corporate entities and the Petitioners, designated by the Receiver as the shareholders of these entities who, as such, "have a beneficial interest in the property." The state court litigation was brought at the request of the Petitioners as shareholders, with the approval of the Receiver, the government and the District Court. Regardless of whether the Petitioners could have brought a direct action, they would be entitled as sole shareholders, to bring a derivative cause of action if the corporation or the Receiver had refused to do so. And, it is axiomatic that "every suit in a derivative capacity necessarily includes a suit in an individual capacity as well." *May v. Midwest Refining Co.*, 121 F.2d 431 (4th Cir. 1941) (quoting Col. Law Rev., 405, 416 n.78).

Summary dismissal of the state court litigation (without any consideration) by both the Petitioners *and* the corporation is required by the District Court in the Receivership proceeding, not by the state court where the litigation against Tiburon was brought. Although the state court also ordered dismissal of the litigation prior to discovery, the California Court of Appeal reversed that decision and remanded the Petitioners' cause of action of unlawful precondemnation downzoning to the trial court. The Court of Appeal held that it would not "speculate on the facts, if any, the Plaintiffs will be able to produce to support allegations in this cause of action." The District Court's decision, reached without allowing the Petitioners the right to conduct discovery, deprives the Petitioners of their property without the procedural safeguard of due process.

A. As Sole Shareholders, The Petitioners Have Suffered Injuries Caused By The Decrease In The Value Of The Property

The Court of Appeals' decision that the Petitioners do not have a direct cause of action against Tiburon and that any claim of consequential damages is incidental to the injury caused to the corporation, does not mean, as argued by the government, that Petitioners have not been injured and are not entitled to due process protections in the Receivership proceeding.

The general rule that a shareholder cannot bring a direct cause of action for a third-party injury to the corporation is grounded on several policy reasons. First, a contrary rule would authorize suits by each shareholder and result in a multiplicity of suits against the wrongdoer and ignore the corporate entity. *Sutter v. General Petroleum Corporation,* 28 Cal.2d 525, 170 P.2d 898 (Cal. 1946). Second, the rule is necessary so that damages recovered by the corporation may be available for payment of the corporation's creditors. *Martin v. Maldonado,* 572 P.2d 763, 773 n.34 (Alaska 1977). Lastly, permitting individual recovery could have the effect of removing from the board of directors its prerogative to use the recovered damages for any legitimate business purpose. *Commonwealth of Massachusetts v. Davis,* 140 Tex. 398, 168 S.W.2d 216, 221 (Tex. 1943).

These reasons, however, have no bearing on the issue in this case of whether the Petitioners have suffered injury or have been deprived of property by the actions of Tiburon. Petitioners and their wives are the sole shareholders of the corporation which owns the Tiburon Property. Thus, there can be no multiplicity of lawsuits against Tiburon by other shareholders or the corporate entities which are already named Plaintiffs in the Tiburon litigation. It is also undisputed that the government is

the only creditor entitled to claim the proceeds of the sale of the Tiburon Property or to any damages which are collected in the Tiburon litigation. There are no other corporate creditors involved in the Receivership nor are there any legitimate business purposes for which recovered damages might be used by the corporation or the Receiver.

The Tiburon Property and the litigation against Tiburon are the last remaining assets of the Pine Street Corporation which continues its existence as a corporate entity for the sole purpose of liquidating those assets. All proceeds from the sale of those assets will be applied to reduce the Petitioners' tax liabilities. Thus, even if Petitioners are not entitled to bring a direct cause of action, it does not follow that Petitioners have not suffered injury or have not been deprived of property.

The Court of Appeals' concluded that "the Receivership has valid claims against Tiburon." Its decision that those claims, however, were "speculative at best" was based on the District Court's findings that there were insufficient facts to demonstrate any unlawful precondemnation activity by Tiburon. These decisions, reached without an opportunity for discovery, deprive the Petitioners of their last remaining assets without the essential procedural safeguard of due process.

B. The Petitioners' Right To Due Process Protection Is Not Dependant On Their Right To Directly Sue Tiburon

As sole shareholders, any recovery by Pine Street in the Tiburon litigation, which will be applied to reduce Petitioners' tax liabilities, would compensate the Petitioners in their capacity as shareholders. Thus, the "so-called" settlement of the litigation against Tiburon, without any consideration, will deprive the Petitioners of property regardless of their ability to bring a

direct cause of action. The government argues that the Petitioners, however, have no right to conduct discovery [2] with respect to the claims of the Pine Street Corporation, because "the Receiver, not Petitioners, had exclusive control over the stock of the Pine Street Corporation and was authorized to manage and conserve the assets of the corporation pending sale of the assets and foreclosure." (Opp. at 7) (Citing *Loeb v. Berman*, 20 P.2d 685, 686 (Cal. 1933))

Unlike *Loeb*, however, the Receiver in this case has not been substituted as the Plaintiff for the corporation in the state court proceeding.[3] The Receiver, further, instituted the litigation against Tiburon on behalf of the corporation and the Petitioners as beneficial owners of the property at the Petitioners' request and with the approval of the court. If the Receiver had refused to bring the suit or "where it would be a vain thing to make a demand upon [it], and it is shown there is a necessity

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[2] The government incorrectly states that Petitioners' due process objection that "additional discovery" was required was first raised as a separate issue in the Petition for Rehearing in the Court of Appeals. The Petitioners claim was not that *additional* discovery was needed but that *no* discovery had been allowed by the District Court (Appellants' Brief at 20, 21) and that the District Courts action "clearly violates the Appellants' constitutional rights to due process and access to the Court." (Appellants' Brief at 11) In its Petition for Rehearing, Petitioners further argued that the Court of Appeals decision that the Pine Street cause of action, although valid, was speculative, was in conflict with a decision of the Court of Appeals issued shortly before oral argument. That decision held that property owners alleging violation of equal protection rights, (as are alleged in Petitioners claim against Tiburon) arising from the use of a city's regulatory powers to deflate the value of a Plaintiffs' property which it wants to acquire, was a fact question precluding summary judgment. *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996)

[3] In the state court litigation, the Town of Tiburon filed a motion to compel the joinder of the Receiver as a necessary party, "as the person possessing 'exclusive control, custody and possession' of the subject property" because "the town and Plaintiffs would not be able to settle this action without the Receiver's participation." The Receiver, however, was not subsequently added as a Plaintiff.

for a suit for the protection of the interest of creditors", the shareholder is free to sue. *Landy v. FDIC*, 486 F.2d 139, 148 (3d Cir. 1973) (quoting *O'Connor, et al. v. Rhodes*, 65 App.D.C. 21, 79 F.2d 146 at 149, aff'd sub nom. *United States Shipping Board Merchant Fleet Corp. v. Rhodes*, 297 U.S. 383, 56 S.Ct. 517, 80 L.Ed 733 (1936). This is especially true where, as in this case, the Receiver is hostile to the claims asserted by the Plaintiff and is objecting not only to the shareholders right to sue, but as well against the validity of the claim. *Id.* at 148.

Prior to his appointment as Receiver, Mr. Collette's law firm was retained by the original Receiver to represent the Receivership in the efforts to obtain favorable zoning for the Tiburon Property. After receiving considerable monies in legal fees as counsel to the Receivership, and following his appointment as Receiver, Mr. Collette's firm was initially involved in the preparation of the second complaint filed against Tiburon. Subsequently, however, Mr. Collette as Receiver, recommended that the property should be sold to the city of Tiburon for the appraisal price.[4] He further recommended that the litigation be withdrawn because the claims against Tiburon, which had thus far involved the expenditure of over 2.5 Million dollars in Receivership funds, were speculative.

In cases such as this, where the Receiver is hostile to the claims asserted by the Plaintiff shareholder in a suit and argues

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[4] The litigation against Tiburon, does not prevent the sale of the property, which has not been publicly marketed during the many years the Receivership has attempted to obtain zoning approval from Tiburon. Dismissal of the litigation against Tiburon is *only* a requirement if the property is sold to the very entity responsible for its currently depressed value.

not only against the shareholders right to sue but against the validity of the claims, "the rule of the exclusive power in the Receivership is not absolute. To admit of no exception would be to sacrifice substantial rights to matters of form. That is not a purpose for which courts are constituted." *See id.* at 149 (quoting *Brinckerhoff v. Bostwick,* 88 N.Y. 52, 59.

CONCLUSION

At stake is whether the government can deprive a taxpayer of property by denying any opportunity for discovery prior to summary dismissal of the taxpayers litigation claims, on the grounds that these claims are speculative, without any consideration and without any credit given against the taxpayers' liabilities. This issue, which involves one of the most fundamental procedural safeguards of due process, clearly merits this Court's plenary attention.

Respectfully submitted,

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